# CERTIFICATE

## Supreme Court of the United States

OCTOBER TERM, 1927

## No. 235

NEWS SYNDICATE COMPANY

*vs.*

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED MAY 4, 1927

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Vol. 20, 613

(32,667)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 12, 1927

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## IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 3834

NEWS SYNDICATE COMPANY, INCORPORATED, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY et al., Defendants in Error

Error to the District Court of the United States for the Northern District of Illinois, Eastern Division

ORDER TO TRANSMIT QUESTIONS OF LAW

The above entitled cause having been fully heard and argued in this court before the below subscribing judges thereof, and certain questions of law having arisen in said cause whereon this court is in doubt, and for its proper decision of such questions desires the advice and instruction of the Supreme Court of the United States:

It is therefore ordered, that the following statement and questions be certified to the Supreme Court of the United States, in pursuance of the Act of Congress in such case made and provided.

### Statement of Facts

1. On March 26, 1926, the above named plaintiff in error filed in the District Court of the United States in and for the Northern District of Illinois, Eastern Division, its declaration, which is in the words and figures following:

[fol. 2] PETITION

To the Honorable Judges of the District Court of the United States for the Eastern Division of the Northern District of Illinois:

The plaintiff, News Syndicate Company, Incorporated, a corporation organized and existing under the laws of the

state of New York, with its principal office and place of business at New York City, New York, by Luther M. Walter, John S. Burchmore and Nuel D. Belnap, its attorneys, complaining of the defendants, The New York Central Railroad Company, a corporation operating an interstate common carrier railroad through the Eastern Division of the Northern District of Illinois, with its principal operating office at Chicago, Illinois, The Pennsylvania Railroad Company, a corporation operating an interstate common carrier railroad through the Eastern Division of the Northern District of Illinois, with its principal operating office at Chicago, Illinois, The Delaware, Lackawanna & Western Railroad [fol. 3] Company, a corporation operating an interstate common carrier railroad with its principal operating office at New York City, New York, and Lehigh Valley Railroad Company, a corporation operating an interstate common carrier railroad with its principal operating office at New York City, New York, represents:

I

For That Whereas, on or about the 2nd day of July, 1923, the plaintiff, as co-complainant with the Ontario Paper Company, Limited, filed a complaint with the Interstate Commerce Commission against the defendants above named, and others, in which it assailed as unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, the carload rate on newsprint paper applicable on shipments of the complainant made from Thorold, Ontario, Canada, to New York City, New York, particularly alleging that the rates or portions of rates maintained and applied by the defendants herein on said shipments for that portion of said transportation from Thorold to New York City which is within the United States are, have been and will be for the future, until reduced, unjust and unreasonable and in violation of section 1 of the Interstate Commerce Act, and asked damages therefor, said complaint being attached hereto, marked Exhibit A, and made a part hereof as though fully set forth at this point. The said Interstate Commerce Commission docketed said complaint under I. C. C. Docket No. 15034, the defendants filed answer thereto, and the issues were duly made up.

II

That the said Interstate Commerce Commission, after full hearing in said I. C. C. Docket No. 15034, and in all things proceeding legally and in accordance with the provisions of the Interstate Commerce Act on the 25th day of November, 1924, filed its decision and report in said cause, in which it found that the rate assailed as above described was unjust and unreasonable, and that the plaintiff herein was entitled to reparation with interest on account of the assessment of said unreasonable rates and charges by the defendants on the shipments made by the plaintiff, said decision and report in said cause being marked Exhibit B, at-ached hereto and made a part hereof as though fully set forth at this point.

[fol. 4] III

That thereafter, on petition of the defendants, the said I. C. C. Docket No. 15034 was re-opened for further oral argument and said oral argument having been had, the said Interstate Commerce Commission, on October 17, 1925, issued its further report and decision affirming, without modification, the findings of the Commission in its report of November 25, 1924, said decision on re-argument being marked Exhibit C, attached hereto and made a part hereof as though fully set forth at this point.

IV

That subsequent to the issuance of the said reports and orders of the Interstate Commerce Commission above referred to, and in accordance with the directions contained in said reports and orders, were submitted to the Interstate Commerce Commission statements showing the shipments upon which the said Interstate Commerce Commission in its aforesaid reports and orders authorized an award of reparation to the said plaintiff, said statements having been theretofore submitted to, checked, verified as to accuracy, and agreed to by the above named defendants, and thereupon the said Commission, in all things proceeding legally, issued its reparation order under date of January 11, 1926, in words and figures as follows:

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 11th Day of January, 1926

No. 15034

ONTARIO PAPER COMPANY, LIMITED et al.

v.

CANADIAN NATIONAL RAILWAYS et al.

"Order

It appearing, That on November 25, 1924, the Commission entered its report, and on October 17, 1925, its report on re-argument, in the above entitled proceeding, which reports are hereby referred to and made a part hereof, and this proceeding now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question; we find that complainant News Syndicate Company, [fol. 5] Incorporated, is entitled to awards of reparation from the defendants named in the following table, in the amounts set opposite their respective names, with interest:

| Defendants | Amounts | With interest from |
|---|---|---|
| Canadian National Railways; and The New York Central Railroad Company | $366 35 | Jan. 1, 1923 |
| Canadian National Railways; and The Pennsylvania Railroad Company | 146 88 | Nov. 7, 1921 |
| Canadian National Railways; and The Delaware, Lackawanna & Western Railroad Company | 5,359 39 | Aug. 15, 1924 |
| Canadian National Railways; and Lehigh Valley Railroad Company | 23,595 68 | Feb. 15, 1923 |

It is therefore ordered, That the defendants, named in the above table, be, and they are hereby, authorized and directed to pay unto complainant, News Syndicate Company, Incorporated, on or before February 20, 1926, the

amounts set opposite their respective names in the said table, with interest thereon at the rate of six per cent per annum from the dates therein set forth, as reparation on account of unreasonable rates charged for the transportation of numerous carloads of newsprint paper from Thorold, Ontario, Canada, to New York, N. Y.

By the Commission.

George B. McGinty, Secretary," (Seal.)

V

That the plaintiff has been damaged by the assessment upon its shipments by the defendants of the unreasonable rates as is alleged in the complaint, Exhibit A hereto, and as found by the said Interstate Commerce Commission in its reports and orders of November 25, 1924, and October 17, 1925, Exhibits B and C hereto, and that said damage amounts to the sums specified in the reparation order of the Interstate Commerce Commission as set forth in paragraph IV above.

[fol. 6]

VI

That the said reparation order was fully served upon the said defendants by depositing a copy thereof with them, and each of them, or with their duly authorized agents for service, and by posting a copy of the said reparation order in the office of the Interstate Commerce Commission in the city of Washington, District of Columbia, as is provided in the Interstate Commerce Act, but the said defendants, though often requested, refused to comply with the said reparation order within the time therein specified, so that there is now due and owing to the plaintiff from the defendant, The New York Central Railroad Company, the sum of Three Hundred Sixty-six Dollars and thirty-five cents, ($366.35), with interest thereon at six (6) per cent per annum from January 1, 1923; from the defendant, The Pennsylvania Railroad Company, the sum of One Hundred Forty-six Dollars and eighty-eight cents, ($146.88), with interest thereon at six (6) per cent per annum from November 7, 1921; from the defendant, The Delaware, Lackawanna & Western Railroad Company, the sum of Five Thousand Three Hundred Fifty-nine Dollars and thirty-nine cents, ($5,359.39), with interest thereon at six (6) per

cent per annum from August 15, 1924, and from the defendant, Lehigh Valley Railroad Company, the sum of Twenty-three Thousand Five Hundred ninety-five dollars and sixty-eight cents, ($23,595.68), with interest thereon at six (6) per cent per annum from February 15, 1923, to the damage of the plaintiff against the defendants in the sums immediately above specified.

Wherefore, the premises being considered, the plaintiff prays for process in due form, and on final hearing for judgment for the aforesaid damages and interest, together with its costs and attorney's fees, and in duty bound will ever pray.

Luther M. Walter, John S. Burchmore, Nuel D. Belnap, Attorneys for Plaintiff.

(Endorsed:) Filed Mar. 26, 1926. Charles M. Bates, Clerk.

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[fol. 7] EXHIBIT "A" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 15034

THE ONTARIO PAPER COMPANY, LIMITED, NEWS SYNDICATE COMPANY, Incorporated, The Tribune Company, Complainants,

vs.

CANADIAN NATIONAL RAILWAYS, GRAND TRUNK RAILWAY COMPANY of Canada, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, The Pennsylvania Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company, New York, Ontario & Western Railway Company, West Shore Railroad Company (The New York Central Railroad Company, Lessee), The Michigan Central Railroad Company, Defendants

Luther M. Walter, John S. Burchmore, Nuel D. Belnap, Attorneys for Complainants.

E. M. Antrim, Traffic Manager.
June 28, 1923.

[fol. 8] COMPLAINT

The complaint of the above named complainants respectfully shows that:

I

Complainant, The Ontario Paper Company, Limited, is a corporation organized under the laws of the Province of Ontario, Canada, engaged in the manufacture and sale of newsprint paper, with factory and place of business at Thorold, Province of Ontario, Canada, adjacent to and served by the tracks of the Grand Trunk Railway Company of Canada, all of its freight traffic being handled out of said plant by the said Grand Trunk Railway Company of Canada as initial carrier.

Complainant, News Syndicate Company, Incorporated, is a company incorporated under the laws of the State of New York with its place of business at 25 Park place, New York City, New York. It is organized, among other purposes, to publish and is engaged in publishing a daily newspaper at New York City, known as "The Daily News."

[fol. 9] Complainant, The Tribune Company is a company organized under the laws of the State of Illinois, with its principal places of business at 7 South Dearborn street and 431 North Michigan boulevard, in the City of Chicago, Illinois. The Tribune Company is sole owner of its subsidiary corporations, the above named The Ontario Paper Company, Limited, and News Syndicate Company, Incorporated.

II

The defendants above named are common carriers engaged in the transportation of property, wholly by railroad (and also partly by railroad and partly by water), between various points in different states of the United States and also between various points in the United States and in adjacent foreign countries, including transportation from Thorold, Ontario, Canada, to New York City, New York, and as such common carriers so engaged, they are subject to the Interstate Commerce Act.

III

For more than four years past, complainant, The Ontario Paper Company, Limited, has been selling and shipping newsprint paper in carloads from its said plant at Thorold, Ontario, Canada, to New York City, New York, and it expects in the future to continue making such shipments, over the lines of carriers above named as defendants.

IV

For the transportation of newsprint paper in carloads from Thorold, Ontario, Canada, to New York City, New York, the defendants now publish and maintain and for a period of more than four years past have published and maintained through joint rates of freight which are and have been as follows:

26.5 cents per 100 pounds, as published in Grand Trunk Railway Company Tariff I. C. C. No. 2678, effective June 25, 1918; and the same rate, as published effective December 15, 1919, in the same carrier's I. C. C. No. 2771;

37 cents per 100 pounds, as published in the same carrier's Tariff I. C. C. No. 2858, effective August 26, 1920; [fol. 10] and the same rate as published in Canadian National Railways Tariff I. C. C. E-68, effective August 10, 1921;

33.5 cents per 100 pounds, as published in the same carrier's I. C. C. No. E-108, effective July 1, 1922, and still in effect.

The aforesaid rates have been, are, and will be for the future, until changed, unjust, unreasonable and excessive in violation of Section 1 of the Interstate Commerce Act.

For that portion of said transportation from Thorold to New York City, which is within the United States, the rates or portions of rates maintained and applied by the defendants are, have been, and will be for the future, until reduced, unjust and unreasonable in violation of Section 1 of the Act.

V

The defendants severally or collectively, according as their routes run and as they participate in the transportation, publish and maintain rates applicable on carload ship-

ments of newsprint paper from various points of origin in the provinces of Ontario and Quebec, Canada, to New York City and also from various points in different states of the United States to New York City, including the following rates at present in effect:

| Originating point | Rate | Tariff authority |
|---|---|---|
| Niagara Falls, New York | 26.5 | New York Central I. C. C. No. 12620 |
| Espanola, Ontario | 34 | Canadian Pacific Ry. I. C. C. No. E-2236 |
| Sturgeon Falls, Ontario | 34 | Canadian Pacific Ry. I. C. C. No. E-2236 |
| Iroquois Falls " | 44 | Canadian National Railways I. C. C. E-108 |
| Jonquiere, Quebec | 39 | " " " " E-108 |
| Grand Mere " | 34 | " " " " E-108 |
| Shawinigan Falls, Quebec | 34 | " " " " E-108 |
| Three Rivers, Quebec | 34 | Canadian Pacific Ry. I. C. C. No. E-2236 |
| Windsor Mills, Quebec | 34 | Canadian National Railways I. C. C. E-108 |
| Woodland, Me. | 31 | Maine Central R. R. I. C. C. No. C-3892 |
| Augusta, Me. | 29 | " " " " " C-3892 |
| Rumford, Me. | 29 | " " " " " C-3892 |
| Livermore Falls, Me. | 29 | " " " " " C-3892 |
| Berlin, N. H. | 28 | Boston & Maine R. R. I. C. C. No. A-2453 |
| Malone, N. Y. | 27 | New York Central R. R. I. C. C. No. 12913 |
| Chateaugay, N. Y. | 27 | Rutland R. R. I. C. C. 5166 |
| Watertown, N. Y. | 25 | New York Central R. R. I. C. C. No. 13777 |
| Carthage, N. Y. | 25 | " " " " " " 13777 |
| Alexandria, Ind. | 34.5 | W. J. Kelly, Agent, I. C. C. No. 1107 |

Competitors of complainant, The Ontario Paper Company, Limited, with mills at points named above, and at other points in the vicinity thereof taking the same or substantially the same rates, have the benefit of the aforesaid [fol. 11] rates on their carload shipments of newsprint paper to New York City.

During the period of four years or more last past, rates have been published and maintained or participated in by defendants from the aforesaid points in the provinces of Ontario and Quebec and in various states of the United States, which were, substantially speaking, higher, or lower, than the present rates by the amounts or percentages of the general advances and reduction under General Order 28, Ex Parte 74, and Docket No. 13293, effective respectively June 25, 1918, August 26, 1920, and July 1, 1922.

## VI

The rates published and maintained by defendants and applied to the transportation of newsprint paper from Thorold to New York City, as referred to in paragraph IV hereof, have been, are, and will be for the future, unduly

discriminatory against and unduly prejudicial to complainant, The Ontario Paper Company, Limited, and its said traffic, when compared with and in relation to each and every rate from other and competing points as named in paragraph V hereof, which said rates, are unduly preferential to said points, to the mills there situate, and to the traffic therefrom, in violation of Section 3 of the Interstate Commerce Act.

For the portion which is within the United States, of said transportation from Thorold to New York City, the rates or portions of rates published and maintained by the defendants are, have been, and will be for the future, unduly discriminatory and unjustly prejudicial against complainants and their said traffic, in violation of Section 3, as compared with the rates maintained and charged on traffic from the points referred to in paragraph V hereof.

For the portion which is within the United States, of said transportation from Thorold to New York City, the rates or portions of rates published and maintained by the defendants are, have been, and will be for the future unduly discriminatory and unjustly prejudicial in violation of Section 3 in comparison with, or in relation to the rates or portions of rates published and maintained by the defendants for their services within the United States from the points in Ontario and Quebec referred to in paragraph V hereof.

[fol. 12] VII

During the period of two years prior to the filing of this complaint, the complainant, The Ontario Paper Company, Limited, has shipped numerous carloads of newsprint paper from Thorold to New York City, some of which have been consigned to itself or to its order, and some of which have been consigned to complainant, New Syndicate Company, Incorporated. The said shipments have been sold on terms f. o. b. cars at Thorold, Ontario, Canada. The freight charges thereon have been paid by one or the other of said complainants to the defendants herein and have been finally borne, as such, by complainant, News Syndicate Company, Incorporated.

The complainants expect to continue in the future shipping carloads of newsprint paper from Thorold over the

lines of defendants and receiving the same at New York City, paying and bearing the freight charges thereon.

By reason of the facts stated in paragraphs IV, V and VI hereof, complainants have been subjected to the payment of charges for transportation which were, when exacted, and still are, excessive, unjustly discriminatory and unduly prejudicial, in violation of Sections 1 and 2 of the Act; and on future shipments, until the rates are changed, they will be subjected to payment of charges which will be unlawful in the same respects. The complainants have been injured thereby to their damage in a large sum, exceeding $15,000.

Wherefore, complainants pray that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act to regulate commerce and establish and put in force and apply in the future to the transportation of newsprint paper, carloads, from Thorold, Ontario, Canada, to New York City, New York, in lieu of the rates named in paragraph IV such other rates as the Commission may deem reasonable and just and also pay to the complainants by way of reparation for the unlawful charges hereinbefore alleged, the sum of $15,000, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainants are entitled to as an award of damages under the provisions of said Act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Chicago, Illinois, June 28, 1923.

[fol. 13] The Ontario Paper Company, Limited, Thorold, Ontario, Canada; News Syndicate Company, Incorporated, 25 Park Place, New York City, N. Y.; The Tribune Company, 7 South Dearborn Street, Chicago Ill., by Luther M. Walter, John S. Burchmore, Nuel D. Belnap, Attorneys for Complainants. E. M. Atrim, Traffic Manager for Complainants, Room 1108 Tribune Bldg., Chicago, Ill. Walter, Burchmore, Collin & Belnap, 2003 Chicago Temple Building, Chicago, Ill.

EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 15034

ONTARIO PAPER COMPANY, LIMITED et al.

v.

CANADIAN NATIONAL RAILWAYS et al.

No. 15034

ONTARIO PAPER COMPANY, LIMITED et al.

v.

CANADIAN NATIONAL RAILWAYS et al.

Submitted July 1, 1924. Decided November 25, 1924

Rate on newsprint paper, in carloads, from Thorold, Ontario, Canada, to New York, N. Y., found unreasonable. Reparation awarded.

Luther M. Walter, Xuel D. Belnap, M. C. Martin, E. M. Antrim, and H. A. Laird for complainants.

William M. Collin, jr., for Spanish River Pulp & Paper Mills, Limited, and G. H. Mead Company; and J. E. Bryan for Wisconsin Traffic Association and Kimberly-Clark Company, interveners.

Parker McCollester for defendants in the United States.

[fol. 14] Report of the Commission

Division 3, Commissioners Hall, Campbell, and Cox

By DIVISION 3:

Complainants and defendants excepted to the report proposed by the examiner, and were heard in oral argument.

Complainant, the Ontario Paper Company, Limited, manufactures newsprint paper at Thorold, Ontario, Canada. Complainant, News Syndicate Company, Incorporated, publishes a newspaper at New York, N. Y. Each is a subsidiary of the Tribune Publishing Company, also a com-

plainant. By complaint filed July 2, 1923, complainants allege that the joint rate charged on newsprint paper, in carloads, from Thorold to New York, and the proportions of that rate received by the carriers which performed and perform the transportation in so far as it took or takes place within the United States, have been and are unreasonable, unjustly discriminatory, and unduly prejudicial. We are asked to prescribe a just and reasonable rate for the future and to award reparation. Only the defendants operating in the United States entered appearances at the hearing and the term defendants as hereinafter used will be confined to those so appearing. The Spanish River Pulp & Paper Mills, Limited, the G. H. Mead Company, the Wisconsin Traffic Association, and the Kimberly-Clark Company were permitted to intervene. They appeared at the hearing but introduced no evidence. Rates will be stated in cents per 100 pounds.

Thorold is a local point on the Canadian National Railways, 30 miles from Black Rock, N. Y., where connection is made with the New York Central, the Delaware, Lackawanna & Western, hereinafter called the Lackawanna, and other railroads reaching New York, and 12 miles from Suspension Bridge, N. Y., where connection is made with the New York Central, the Lehigh Valley, and other railroads serving New York. The rate assailed applies over several railroads from each of these junctions. The short-line distance from Thorold to New York is over the Canadian National to Black Rock and the Lackawanna beyond. The carriers' distance tables show the distance from Black Rock to New York to be 414 miles, making a short-line distance from Thorold of 444 miles. If the Delaware Water Gap cut-off is used the distance over the Lackawanna is 14 miles less than that stated. The shipments moved to Suspension Bridge and thence over the New York Central or the Lehigh Valley. The distance from Suspension Bridge to New [fol. 15] York over the New York Central is 447 miles, making a through distance over this route of 459 miles.

Newsprint, in carloads, is rated fifth class in the official classification, but by exceptions of long standing has generally been accorded a sixth-class rating to all points subject to that classification to which joint rates are published. In 1914 there was in effect a joint sixth-class rate of 19.5 cents

from Thorold to New York. In view of the fact that there were contemporaneously in effect sixth-class rates of 4.5 cents from Thorold to Suspension Bridge, and 13 cents from Suspension Bridge to New York, a commodity rate on newsprint of 17.5 cents from Thorold to New York was established effective July 9, 1914. The rate became 18.5 cents pursuant to the Five Per Cent Case, 32 I. C. C. 325, 21 cents pursuant to the Fifteen Per Cent Case, 45 I. C. C. 303, and successively 26.5, 37, and 33.5 cents under the general percentage changes of 1918, 1920, and 1922, respectively.

In the winter of 1921-22 the Canadian carrier proposed to the carriers in the United States that they concur in a joint Thorold-New York rate on newsprint of 31 cents in place of the contemporaneous 37-cent rate, conditioned upon a division of the proposed rate which would increase somewhat instead of reducing the amount accruing to the Canadian carrier. A public hearing on the proposition was held in March, 1922. It failed to secure the approval of a majority of the members of the association of carriers in the United States. Since that time the matter has been considered at various times by committees representing the carriers in the United States.

For the year ended June 30, 1922, 533 carloads of newsprint, of an average weight of 48,975 pounds, were shipped from the Thorold mill to the New Syndicate Company; from July 1, 1922, to April 23, 1923, 125 carloads; and from the last-mentioned date to October 17, 1923, 38 carloads. Complainants attribute the diminishing movement to the measure of the rate. The average loading per car subsequent to July 1, 1922, was 52,107 pounds. The estimated consumption of newsprint by the News Syndicate Company for 1924 is 30,000 tons, of which 10,000 tons have been contracted for at Thorold, It is suggested that a lower rate would result in increased shipments.

The following table, compiled from complainants' exhibit, compares the rate from Thorold to New York with rates from other newsprint-producing points and groups to the same destination. The mileage shown is the short-line [fol. 16] distance, and for groups the average short-line distance, using routes over which the rate applies, to the lighterage terminal of the delivering carrier. The last two columns show, respectively, the percentage relationship of

the distance from Thorold to the distance from the point or group indicated, and the percentage relationship of the rate from Thorold to the rate from the point or group indicated.

| To New York from— | Distance | Rate | Ton-mile earnings | Distance relationship of Thorold | Rate relationship of Thorold |
|---|---|---|---|---|---|
| | Miles | Cents | Mills | Per cent | Per cent |
| Thorold | 444 | 33.5 | 15.09 | 100 | 100 |
| Alexandria, Ind. | 848 | 34.5 | 8.54 | 55 | 97 |
| Fox River, Wis., group | 1,075 | 47.5 | 8.84 | 41 | 70 |
| Northern Wisconsin, group | 1,122 | 51 | 9.09 | 40 | 66 |
| Sartell, Minn.[1] | 1,296 | 35 | 8.09 | 34 | 61 |
| Sault Ste. Marie, Ontario | 895 | 47.5 | 10.61 | 50 | 70 |
| Iroquois Falls, Ontario | 868 | 44 | 10.14 | 51 | 76 |
| Jonquiere, Quebec | 683 | 39 | 11.42 | 65 | 86 |
| St. Raymond, Quebec | 545 | 36 | 13.21 | 81 | 93 |
| Espanola, Ontario, group | 807 | 34 | 8.43 | 55 | 98 |
| Grand Mere, Quebec, group | 464 | 34 | 14.65 | 96 | 98 |
| Niagara Falls, N. Y. | 443 | 26.5 | 11.96 | 109.2 | 126 |
| Watertown, N. Y. | 257 | 25 | 19.46 | 173 | 134 |
| Norwood, N. Y., group | 372 | 27 | 14.52 | 119 | 124 |
| Berlin, N. H., group | 346 | 25 | 14.45 | 128 | 134 |
| Augusta, Me. | 398 | 25.5 | 12.81 | 112 | 131 |
| Livermore Falls, Me. | 404 | 26 | 12.87 | 110 | 129 |
| Madison, Me. | 436 | 26.5 | 12.16 | 102 | 126 |
| Woodland, Me., group | 566 | 29 | 10.25 | 78 | 116 |

[1] Minnesota group.

Although the above table lists hauls which are shorter as well as hauls which are longer than that from Thorold, only the rate from Watertown, N. Y., yields ton-mile earnings higher than those under the rate from Thorold; and with respect to Watertown only is Thorold's rate percentage less than its distance percentage. On the distance shown from the Grand Mere group the figures in connection with that group approximate those for Thorold. Complainants trace the history of the Grand Mere rate and the routes over which it has been established to support their contention that it still reflects the average distance of 574 miles for which it was originally established.

Complainants introduced figures to show that the traffic density on the routes from Thorold to New York is much higher than on the routes from other points in Canada and points in northern New York producing newsprint.

The rate on newsprint from Alexandria, Ind., to New York, is constructed with relation to the Chicago-New York

[fol. 17] basis. For a number of years prior to the decision of the Five Per Cent Case, supra, the Chicago-New York rate on newsprint had been 20 cents, which was 80 per cent of the contemporaneous sixth-class rate. Under the authority of that decision it was increased to 21 cents. The contemporaneous rates on newsprint from Alexandria to eastern points represented the usual proportion of the Chicago-New York commodity rates under the general scheme of percentage groups. Although Cheboygan, Mich., was in the 120 per cent group, it was accorded the same rate on newsprint to New York as Chicago. In Official Classification Rates on Paper, 38 I. C. C. 120, 127, the proposal to increase the rates from points in central territory, including Alexandria and Cheboygan, which were stated to be the only points in that territory where newsprint was produced, to points in trunk-line territory from their percentage of the Chicago-New York newsprint rate of 21 cents to the same percentage of the contemporaneous sixth-class rate of 26.3 cents was found not justified. Subsequently the 21-cent Chicago-New York commodity rate became 24 cents under the 15 per cent increase, and 30 cents under the 25 per cent increase. The percentage relationship of the commodity rates to eastern points from Alexandria and Cheboygan, and from other points in central territory from which commodity rates on newsprint were named, to the commodity rate from Chicago to New York was preserved. The commodity rates were subsequently canceled from points at which newsprint was not manufactured, or from which there was no movement thereunder, including Chicago. The present rate from Alexandria embodies Alexandria's proportion under the general percentage scheme of the Chicago-New York commodity rate subjected to the general increases and reductions occurring since its cancellation.

The rates to New York on newsprint from the Fox River, northern Wisconsin, and the Minnesota groups also reflect the Chicago-New York commodity rate mentioned. The rates from the first two groups were constructed by adding the Chicago-New York commodity rate to the rate from the origin group to Milwaukee, Wis., which is in the Chicago percentage group. The rates thus established were subjected to the 40 per cent increase and the 10 per cent reduc-

tion. The rate from the Minnesota group embodies the arbitrary over the rate from Fox River which is observed in the rates from these groups to Chicago pursuant to Minnesota & Ontario Paper Co. v. N. P. Ry. Co., 66 I. C. C. 571.

In the general scheme under which rates from points in [fol. 18] central territory to New York are constructed, Thorold is in the group taking rates which are 78 per cent of the Chicago-New York rate. If the Chicago-New York commodity rate had been continued and had been subjected to the general percentage changes which followed its cancellation it would now be 38 cents. A rate constructed on the basis of 78 per cent of that rate would be 29.5 cents. As hereinbefore noted, the original commodity rate on newsprint from Chicago to New York was 80 per cent of the contemporaneous sixth-class rate. The present sixth-class rate from Thorold to New York is 37 cents. A rate 80 per cent of that rate would also be 29.6 cents. On a distance from Thorold to New York of 444 miles this rate would yield ton-mile earnings of 13.29 mills. Complainants contend that the rate should be 28 cents, which would be the rate proposed in the winter of 1921-22 by the Canadian National Railways reduced 10 per cent. For the distance mentioned this rate would yield ton-mile earnings of 12.61 mills. In support of their contention for a rate less than 78 per cent of the constructive rate from Chicago to New York derived as hereinbefore described, complainants point out that Thorold is almost at the eastern edge of the 78 per cent group in Canada extending eastwardly along the north shore of Lake Erie from the Detroit River. Along the south shore of Lake Erie the 78 per cent group extends eastwardly only to a point a short distance west of Lorain, Ohio, and the succeeding groups to the east are graded down until they reach 60 per cent. The Canadian lines has established rates on specific commodities from points in the 78 per cent group, including Thorold, which are less than 78 per cent of the Chicago-New York rate on the same commodity.

Complainants' exhibits include a table of constructive rates for a distance of 444 miles based on the rates to New York from the several originating points and groups shown in the preceding table, and upon the proposition that generally as the distance increases the ton-mile revenue should decrease. Complainants refer to the scales approved in C.

F. A. Class Scale Case, 45 I. C. C. 254, 299, for application in the greater part of central territory, and in Proposed Increases in New England, 49 I. C. C. 421, for application in the greater part of New England. They ascertain the ratio between the ton-mile earnings under each of those scales for a haul of 444 miles and the ton-mile earnings thereunder for a haul equal in length to each of those under the compared commodity rates. The constructive rates are made by applying this ratio to the ton-mile earnings under [fol.19] the compared rates, and computing the rate for 444 miles from the constructive ton-mile earnings so ascertained. The scales mentioned cover distances up to 660 miles. Complainants' table includes all hauls listed in the preceding table less than 660 miles in length except that from St. Raymond, Quebec. It is reproduced in part below:

| | Distance | Ton-mile earnings | Constructive rate for 444 miles | Constructive ton-mile earnings for 444 miles | |
|---|---|---|---|---|---|
| | | | | C. F. A. scale | New England scale |
| | Miles | Mills | Cents | Mills | Mills |
| Woodland group | 500 | 10.25 | 26 | 11.72 | 11.78 |
| Madison | 436 | 12.16 | 27 | 12.16 | 12.16 |
| Livermore Falls | 404 | 12.87 | 27 | 12.16 | 12.15 |
| Augusta | 398 | 12.81 | 27 | 12.16 | 12.15 |
| Berlin group | 346 | 14.45 | 27.5 | 12.42 | 12.40 |
| Norwood group | 372 | 14.52 | 29 | 13.14 | 13.12 |
| Watertown | 257 | 19.46 | [1]31 | 13.87 | 13.77 |
| Niagara Falls | 443 | 11.96 | 26.5 | 11.92 | 11.94 |
| Grand Mere group | 464 | 14.65 | 33.5 | 15.01 | 15.04 |

[1] By C. F. A. scale ratio, 31 cents; by New England scale ratio, 30.5 cents.

Complainants instance the following existing rates on newsprint from Thorold for hauls approximating in length the haul to New York: To Maitland, Ohio, 444 miles, Caldwell, Ohio, 454 miles, and New Martinsville, W. Va., 411 miles, 27 cents; to Clarksburg, W. Va., 450 miles, 28 cents. The rate from Thorold to Chicago, 508 miles, is 25 cents. Defendants say this rate is applicable for a one-line haul and is depressed by lake competition.

The difference between the short-line distances from Thorold and from Niagara Falls, N. Y., to New York is 1 mile. The difference in the rate is 7 cents. Thorold is less distant from New York than Espanola and Sturgeon

Falls, Ontario, by 363 miles but the difference in rates in favor of Thorold is only 0.5 cent. The distance to Chicago from Niagara Falls is 8 miles greater than from Thorold, and the rate from Niagara Falls is 2.5 cents greater. That is, eastbound the difference against Thorold in rates is 7 cents; westbound the difference in favor of Thorold is only 2.5 cents.

As stated, complainants assail the proportions of the joint rate from Thorold to New York accruing to the carriers within the United States. The lines within the United States receive 25.1 cents of the 33.5-cent rate, as compared with the 26.5-cent sixth-class rate from Niagara frontier points to New York. Of the sixth-class rate of 37 cents from [fol. 20] Thorold to New York the carriers in the United States receive 65 per cent, 24 cents. This division is on transportation to New York stations not requiring floatage. The News Syndicate Company prefers delivery of its newsprint at the New York Central's St. Johns Park station, New York City, where floatage is not required.

This phase of the case will not be discussed at length. On the question of reparation the reasonableness of the joint rate as a whole must be considered. International Nickel Co. v. Director General, 66 I. C. C. 627, 631. For reasons which will be set forth hereinafter, it does not appear necessary that we should now prescribe a separate rate for the future for that portion of the transportation which is in the United States.

Defendants contend that with respect to both reparation on past shipments and the prescribing of a rate for the future our jurisdiction in this proceeding is limited to the determination of the lawfulness of the amount received or to be received for the transportation from the Canadian border to New York. As to reparation, the decisions in International Nickel Co. v. Director General, supra, and a number of later cases, are adverse to this contention and are controlling. Defendants' showing on the propriety of the amounts accruing for the transportation within the United States will be mentioned, however, for the light it may throw on other features of this case.

The distance from Black Rock to Manhattan Island, New York City, over the New York Central is 443 miles. On this distance the division of 25.1 cents accruing to the railroads

from Black Rock to New York yields ton-mile earnings of 11.33 mills. Defendants compare these earnings with ton-mile earnings on newsprint for hauls to New York of comparable distances as follows: From Augusta, Me., 471 miles, 13.6 mills; from Millinocket, Me., 508 miles, 11.4 mills; from Berlin, N. H., 450 miles, 12.4 mills; from Niagara Falls, N. Y., 446 miles, 11.9 mills. They cite Express Class Rates between United States and Canada, 68 I. C. C. 20, where, in finding proposed rates justified, we noted, among other circumstances, that the divisions to be received by the carrier in the United States did not exceed its locals to and from the border.

Defendants' evidence was addressed chiefly to the propriety of the joint rate. Printing and wrapping paper generally move under sixth-class rates in official classification territory. With certain important exceptions newsprint in [fol. 21] that territory takes the same rates as printing and wrapping paper. Important instances in which rates on newsprint in official territory are not on the sixth-class basis, or are not the same as the rates on printing and wrapping paper, are on movements from New England, northern New York, and a part of eastern Canada to central territory, and from Alexandria and Cheboygan to New York and other eastern points. Defendants say that the maintenance of a lower basis for those hauls is attributable to considerations not present in the instant case.

The present rate on newsprint from Thorold to New York is 90.5 per cent of the sixth-class rate. Defendants instance commodity rates on newsprint from numerous points in Maine, New Hampshire, Vermont, Massachusetts, northern New York, and neighboring parts of Canada to New York ranging from 89.5 to 94.3 per cent of the sixth-class rate. From Windsor Mills, Quebec, Ottawa, Ontario, and Niagara Falls and Fulton, N. Y., to New York newsprint takes either sixth-class rates or commodity rates equal to sixth-class rates. From Woodland, Me., to New York the rate on newsprint is 82.9 per cent of the sixth-class rate.

The short-line distance of 444 miles from Thorold to New York hereinbefore mentioned is the distance to Hoboken, N. J. The rate includes delivery in New York, requiring a harbor service on traffic moving over the short-line route or over any railroad terminating on the west shore of the

Hudson River. Defendants contend that when the constructive mileage which might properly be added for the harbor service is taken into consideration, the distances from Thorold over those routes are longer than over the route of the New York Central to St. Johns Park station. They say that the usual route of movement from Thorold to New York is via Black Rock, and that the distance over this route, 473 miles, should be accepted as the real short-line distance. The present rate yields ton-mile earnings of 14.17 mills for that distance. As stated, the shipments moved via Suspension Bridge, 459 miles. On that distance the present rate yields ton-mile earnings of 14.59 mills.

Defendants urge that rates from Thorald to New York should be compared with rates from other points in Canada to New York rather than with rates for hauls wholly within the United States. The following table is compiled from an exhibit introduced by them:

| To New York from— | Distance | Rate | Ton-mile earnings |
|---|---|---|---|
| | Miles | Cents | Mills |
| [fol. 22] Espanola, Ontario | 759 | 47 5 | 12 5 |
| St. Raymond, Ontario | 694 | 36 | 10 4 |
| Donnaconna, Quebec | 678 | 34 | 10 |
| Grand Mere, Quebec | 575 | 34 | 11 8 |
| Jonquiere, Quebec | 832 | 39 | 9 4 |
| Shawinigan Falls, Quebec | 569 | 34 | 11 9 |
| Hull, Quebec | 417 | 34 | 16 3 |
| Three Rivers, Quebec | 560 | 34 | 12 1 |
| Ottawa, Ontario | 415 | 34 | 16 4 |
| East Angus, Quebec | 411 | 34 | 16 5 |
| Fort William, Ontario | 1,270 | 87 | 13 7 |
| Sault Ste. Marie, Ontario | 895 | 47 5 | 10 6 |
| Sturgeon Falls, Ontario | 661 | 40 5 | 12 3 |
| Iroquois Falls, Ontario | 869 | 44 | 10 1 |
| Windsor Mills, Ontario | 434 | 34 | 15 6 |

Defendants particularly refer to the earnings under the rate from Hull, Ottawa, East Angus, and Windsor Mills for hauls approximating in length that from Thorold. These points are in the Grand Mere rate group, and, as set forth earlier herein, complainants say the rate reflects considerably longer distances by the route over which it was

originally established, viz, distances ranging from 557 to 567 miles.

Defendants introduced an exhibit purporting to show the rates on newsprint to New York from every important newsprint-producing point in the United States. They invite particular attention to ton-mile earnings under the rates from northern New York points listed below:

| To New York from— | Distance | Rate | Ton-mile earnings |
|---|---|---|---|
| | Miles | Cents | Mills |
| Brownsville | 324 | 25 | 15.4 |
| Carthage | 301 | 25 | 16.6 |
| Gouverneur | 332 | 25.5 | 15.4 |
| Malone | 394 | 27 | 13.7 |
| Natural Dam | 311 | 28.5 | 18.3 |
| Fulton | 312 | 25 | 16 |
| Glens Falls | 200 | 25 | 25 |
| Ticonderoga | 241 | [1] 25 | 20.7 |

[1] Plus an arbitrary of 13 cents per gross ton.

In all those instances the distances are substantially shorter than from Thorold. The following table, compiled from the exhibit, includes all rates listed for distances ranging from 400 to 500 miles by the shortest route over which they are applicable.

| To New York from— | Distance | Rate | Ton-mile earnings |
|---|---|---|---|
| | Miles | Cents | Mills |
| [fol. 23] Augusta, Me. | 471 | 32 | 13.6 |
| Brunswick, Me. | 437 | 28 | 12.8 |
| Lisbon Falls, Me. | 445 | 28 | 12.4 |
| Madison, Me. | 433 | 26.5 | 12.2 |
| Rumford, Me. | 494 | 31.5 | 12.7 |
| Skowhegan, Me. | 433 | 26.5 | 13.2 |
| Webster, Me. | 478 | 27.5 | 11.5 |
| Gilman, Vt. | 443 | 25 | 11.3 |
| Berlin, N. H. | 419 | 28 | 13.4 |
| Do | 450 | 28.5 | 12.4 |
| Niagara Falls, N. Y. | 446 | 26.5 | 11.9 |

As indicating that the spread of 7 cents between the rates from Thorold and Niagara Falls to New York is not exces-

sive, defendants instance a number of commodities, including turnips, calcium carbide, grain, grain products, and lumber and forest products, on which the spread between the rate to New York from Thorold, or from all or certain points in the same Canadian rate group, and the rate from Niagara Falls is greater. On certain low-grade commodities the spread between the rates from New York to points in the Thorold group and the rates to Niagara Falls is greater than 7 cents. For example, there are spreads of 11 cents on pitch, 9 cents on brimstone, 7.5 cents on bleach, 10.5 cents on aluminum sulphate. On the other hand, there are commodity rates from Thorold and neighboring Canadian points to New York and New York rate points which are as low as or lower than the rates from Niagara Falls to the same destinations.

We find that the rate assailed was unreasonable from August 26, 1920, to June 30, 1922, inclusive, to the extent it exceeded 32 cents per 100 pounds, and that since June 30, 1922, it has been, is, and for the future will be, unreasonable to the extent it has exceeded, exceeds, or may exceed 29.5 cents per 100 pounds. We further find that complainant News Syndicate Company, Incorporated, received shipments under the rate assailed and paid and bore the charges thereon; that it has been damaged thereby in the amount that the charges paid on shipments delivered or tendered for delivery subsequent to July 2, 1921, exceeded those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation, with interest, from defendants which engaged in the transportation of those shipments within the United States. This complainant should comply with Rule V of the Rules of Practice. If it has made any shipments since the hearing [fol. 24] under the rate herein found unreasonable, and has paid the charges thereon, it should submit with its Rule V statement an affidavit stating the facts in that connection. If defendants object to proof by affidavit complainants will be accorded a further hearing.

The general freight traffic manager of the Canadian National Railways stated at the hearing that although the Canadian carrier would not participate in reparation if any should be awarded in this case, it would be willing to concur in the publication of a joint rate of either 29.5 or 28 cents.

It may be assumed that the Canadian carrier and the carriers in the United States can agree upon a division of the joint rate for the future herein found reasonable. We shall not at this time enter an order respecting a rate for the future, but the proceeding will be left open for 90 days in order that the subject may receive consideration if the joint rate is not established.

HALL, Chairman, dissenting:

The majority prescribe 29.5 cents as a maximum reasonable rate for the future. They arrive at this figure by taking the general percentage relationship of Thorold's rates to the Chicago-New York rates and applying that percentage to the figure which would represent that present Chicago-New York commodity rate on paper, if such a commodity rate were still in existence and reflected the general increases and reductions made since that commodity rate was canceled. The basic rate used is a dead rate, and this dead rate was originally established to counteract the effect of a depressed westbound rate from Berlin, N. H., to Chicago which earned 3.99 mills per ton-mile. Official Classification Rates on Paper, 38 I. C. C. 120, 128. I find here little guidance for the future.

In so far as comparison goes the reasonableness of the rate assailed can best be measured by the rates in use from other producing points in Canada. But, it is said, these rates from other Canadian points, notably the Grand Mere group, were originally made to reflect a much greater distance. However that may be as a matter of history, they are live rates, in daily use, and well support the present Thorold basis. The relatively lower rates from New Hampshire mills all bear a higher relationship to the sixth-class rates than does the rate assailed. The New Hampshire producing territory is one of the oldest in the country.

The complaint should be dismissed.

By the commission, division 3.

George B. McGinty, Secretary. (Seal.)

[fol. 25] EXHIBIT "C" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. 15034

ONTARIO PAPER COMPANY, LIMITED, et al.

v.

CANADIAN NATIONAL RAILWAYS et al.

Submitted July 21, 1925. Decided October 17, 1925

Upon reargument, prior report, 95 I. C. C. 66, finding rate on newsprint paper, in carloads, from Thorold, Ontario, Canada, to New York, N. Y., unreasonable, affirmed.

Luther M. Walter for complainants.
Parker McCollester for defendants.

Report of the Commission on Reargument

By the COMMISSION:

In our original report, 95 I. C. C. 66, we found the rate on newsprint paper, in carloads, from Thorold, Ontario, Canada, to New York, N. Y., unreasonable to the extent that it exceeded 32 cents per 100 pounds prior to July 1, 1922, and 29.5 cents thereafter. On petition of defendants the proceeding was reopened for further oral argument.

The rate of 29.5 cents has been published by the Canadian National under its general concurrences from the other defendants, who consider the rate too low. As stated in the prior report that carrier is willing to join in a rate of 29.5 cents but is averse to participating in the reparation awarded.

Defendants say that the reasonableness of the rate in issue must be determined by the rate comparisons of record and that the controlling standard should be rates applying to transportation under conditions as nearly similar as possible to those governing the transportation here considered. They argue that we have erred in not giving proper weight to rates on newsprint paper from other Canadian producing points to New York, and in particular to a rate of 34 cents

from Ottawa, Ontario, and seven other points shown in the table on pages 73 and 74 of our prior report. The average distance to New York from the eight points of origin there shown as having that rate is 507 miles, and the average ton-mile earnings under the rate are 13.4 miles. Defendants contrast this figure with earnings of 12.4 mills per ton-mile [fol. 26] under the rate of 29.5 cents from Thorold, based on a distance of 473 miles via Black Rock, N. Y., and the New York Central. It appears, however, that the rate is not applicable over that route. Based on the short-line distance of 444 miles shown in our original report, the ton-mile earnings are 13.2 mills. From the eight points above mentioned a much greater proportion of the haul is in Canada than from Thorold. Furthermore, the short-line routes from those points embrace lines of New England carriers or the more northerly divisions of the New York Central. It is a well-known fact, substantiated by the record in this case, that the rate level on those lines is, in general, materially higher than that between the Niagara frontier and New York.

In point of distance Thorold's nearest competing point is Niagara Falls, N. Y., about 12 miles away. The short-line distance from Niagara Falls to New York is 443 miles, 1 mile less than from Thorold. For about 97 per cent of the distance from Thorold shipments from that point move over the same rails as those from Niagara Falls. It would seem, therefore, that the fairest basis of comparison is afforded by the rate of 26.5 cents on newsprint paper from Niagara Falls to New York and that a rate 3 cents higher from Thorold is ample to cover the extra service required, involving use of an additional carrier and a crossing of the Niagara River.

Defendants argue that the proximity of Thorold to trunk-line territory might well justify making its rate on newsprint paper to New York the sixth-class rate of 37 cents, as the general basis of rates on that commodity within trunk-line territory is sixth class. Although commodity rates to New York have been established from numerous mills in northern New York and New England, defendants stress the fact that those rates are in general about 90 per cent of sixth class, while the rate of 29.5 cents from Thorold is only 80 per cent of sixth class. As we pointed out in

Washington Publishers' Asso. v. B. & O. R. R. Co., 98 I. C. C. 339, 344, the reasonableness of newsprint rates in official territory cannot be judged primarily by their relationship to sixth class. In any event sufficient recognition to the sixth-class basis for newsprint paper would apparently be given by making the rate from Thorold to New York a reasonable amount higher than the rate from Niagara Falls, which is the sixth-class rate. As stated in our former report, Thorold is near the extreme eastern edge of the so-called 78 per cent group, which extends across southern Ontario from Detroit, Mich., to the Niagara fron- [fol. 27] tier. Complainant shows that defendants have established numerous commodity rates from Thorold and other points in its vicinity to New York and other eastern des-inations, which are lower than the class rates which would otherwise apply. As we previously stated, some of those rates are less than 78 per cent of the Chicago-New York rates on the same commodities.

The question of our jurisdiction to award reparation on shipments from a foreign country to the United States was also touched upon in the reargument. We deem this question to be controlled by our decision in International Nickel Co. v. Director General, 66 I. C. C. 627. In view of its frequent recurrence it seems advisable to repeat our observation in that report that a review of our ruling in the courts would be desirable for future guidance. For the reasons given in our original report in the instant case we see no necessity for making separate findings concerning that portion of the transportation under consideration which is wholly within the United States.

Upon further consideration of the record and of the contentions advanced upon reargument we are of opinion that our findings in the original report should be affirmed without modification.

HALL, Commissioner, dissenting:

For reasons sufficiently stated in my dissent from the original report I am unable to concur in the conclusions of the majority.

WOODLOCK, Commissioner, dissenting:

I do not agree with the majority's disposition of this case, for it has been made upon a record which is lacking in certain testimony which is necessary for proper determination of the matter.

We have reaffirmed our decision of November 25, 1924, finding the rate on newsprint, Thorold to New York, unreasonable, in so far as it exceeded 32 cents between August 26, 1920, and June 30, 1922, and 29.5 cents thereafter. In doing so we have relied mainly upon comparison of the assailed rate with the 26-cent rate from Niagara Falls. While I think that the latter is somewhat low regarded as a maximum reasonable rate, nevertheless prescription for the future of 29.5 cents from Thorold may be defensible. It is to the conclusion from this to unreasonableness during the reparation period that I object. We cannot inflexibly conclude from "relative" unreasonableness to "absolute" [fol. 28] unreasonableness. "A rate may be relatively unreasonable and yet contain none of the elements of absolute unreasonableness." New Pittsburgh Coal Co. v. H. V. Ry. Co., 26 I. C. C., 125. A rate may be unreasonable in the past and reasonable now, or vice versa. In re Wool, Hides, and Pelts, 25 I. C. C., 677; National Hay Asso. v. M. C. R. R. Co., 19 I. C. C., 37; Anadarko Cotton Oil Co. v. A. T. & S. F. Ry. Co., 20 I. C. C., 50.

In judging as to the absolute reasonableness of a rate two main factors must always be considered. One of these is the worth (or "value") of the service to the shipper; the other is the cost of the service to the carrier. Comparison of an assailed rate with similar or analogous rates can seldom of itself carry us beyond a determination of relative reasonableness or unreasonableness. To reach a "just and reasonable" conclusion as to absolute reasonableness or unreasonableness, it is necessary to consider cost of service to the carriers concerned, in so far as it is susceptible of determination. This involves scrutiny of carrier operating revenues and expenses. "Net revenues of carriers have an undoubted and often an important bearing upon the question of the reasonableness of rates, but the value of the service to the shipper and the other elements so often referred to as entering into the reasonable-

ness of rates must also be taken into consideration." R. R. Commissioners of Iowa v. I. C. R. R. Co., 20 I. C. C. 187. See also Memphis Cotton Oil Co. v. I. C. R. R. Co., 17 I. C. C. 319. Whether 32 cents was a maximum reasonable rate in 1922 and 1921 for the carriers concerned in this case is a question for the decision of which we need something more than merely a comparison of rates. We need to know something at least of the cost of service during those periods.

The record in this case is silent upon this point. It contains nothing to show the operating results of the carriers during the reparation period. Under decisions of the courts we are compelled to rely entirely upon the record made in each case. We may not, in making our decisions, draw upon such knowledge as we may have obtained on our own account of matters not included in the record. It is my contention that no record in a reparation case is complete enough for us to give proper judgment thereupon unless it contains information with respect to cost of service during the reparation period. To decide a case where reparation is claimed for the years 1921 and 1922 without evidence on this point is to run a great risk of doing serious injustice. [fols. 29 & 30] It may be that the assailed rate was unreasonable in 1923 when the complaint was filed, yet that it was not unreasonable in 1922 and 1921, for which period reparation is claimed. It may be that it was unreasonable throughout or for only a part of the reparation period for both carriers, and it may be that it was unreasonable for one carrier and not for the other. We are not able on this record to decide any of these questions with certainty, owing to the lack of vital testimony. From one point of view, perhaps, it may be fitting that the carriers concerned should be penalized for their negligence in setting forth their case, but it is not satisfactory that decision in cases of this sort should go by default. It is not difficult to see how in this way abuses might readily arise to which this commission should not make itself party.

The record should be reopened for testimony as to the operating revenues and expenses of the Lehigh Valley and New York Central Railroads during the reparation period so that the question whether the rates assailed were unreasonable or not during that period for both carriers or either of them, can be properly determined.

Commissioner Cox dissents.

By the commission.

George B. McGinty, Secretary. (Seal.)

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[fol. 31] 2. And thereupon said defendants in error appeared and filed their demurrer to said declaration, which is in the words and figures following:

DEMURRER TO PETITION

And the defendants, The New York Central Railroad Company, The Pennsylvania Railroad Company, The Delaware, Lackawanna & Western Railroad Company and Lehigh Valley Railroad Company, by S. C. Murray, D. P. Connell and Parker McCollester, their attorneys, come and defend, etc., when, etc., and say that the said petition and the matters therein contained in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action and that they, the defendants, are not bound by law to answer the same; and this they are ready to verify. Wherefore for want of a sufficient declaration in this behalf the defendants pray judgment and that the plaintiff may be barred from maintaining his aforesaid action, etc.

And the defendants for a special cause of demurrer to said petition show that the order of the Interstate Commerce Commission in I. C. C. Docket No. 15034 is null and void for want of jurisdiction, because the said order deals solely with transportation charges on newsprint paper consigned from a point or points in the Dominion of Canada to a point or points in the United States: And also that the said declaration and each count thereof is in other respects uncertain, informal and insufficient, etc.

S. C. Murray, D. P. Connell, Parker McCollester,
Attorneys for Defendants.

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3. And the said demurrer coming on to be heard, it was sustained by the court, to which ruling of the court plain-

tiff in error then and there duly excepted, and elected to stand by its said declaration. Whereupon the action was dismissed by the court at the cost of plaintiff in error.

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[fol. 32] QUESTIONS CERTIFIED

1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

[fol. 33] 3. When the Interstate Commerce Commission has made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the District Court err in sustaining the demurrer to the said petition?

Witness our hands this — day of April, 1927.

(Signed) Samuel Alschuler, George T. Page, Albert B. Anderson, Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable the Supreme Court of the United States.

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[fol. 34] Clerk's certificate to foregoing omitted in printing.

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Endorsed on cover: File No. 32,667. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 235. News Syndicate Company vs. The New York Central Railroad Company, The Pennsylvania Railroad Company, et al. (Certificate.) Filed May 4th, 1927. File No. 32,667.

FILED
SEP 12 1927
CHARLES ELMORE CROPLEY

No. 235.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

**NEWS SYNDICATE COMPANY, INCORPORATED,**
Plaintiff in Error,

vs.

**THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, et al.,**
Defendants in Error.

On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

## BRIEF ON BEHALF OF NEWS SYNDICATE COMPANY, INCORPORATED.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
NUEL D. BELNAP,
Attorneys for Plaintiff in Error.

BARNARD & MILLER PRINT, CHICAGO

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1927.

**No. 235.**

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**EWS SYNDICATE COMPANY, INCORPORATED,**
Plaintiff in Error,

vs.

**HE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, et al.,**
Defendants in Error.

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On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

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## BRIEF ON BEHALF OF NEWS SYNDICATE COMPANY, INCORPORATED.

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This case comes to this court on certain questions of aw as to which the United States Circuit Court of Appeals was in doubt, and desired the advice and instruction f this court.

On March 26, 1926, the News Syndicate Company, Incorporated, filed its petition in the District Court of the United States in and for the Northern District of Illinois, Eastern Division, to secure judgment in an amount approximating thirty thousand dollars on a reparation order of the Interstate Commerce Commission dated January 11, 1926, made in accordance with the decision of the

Commission on the complaint of the *Ontario Paper Company, Ltd., et al.* v. *Canadian National Railways, et al.*, 95 I. C. C. 66; 102 I. C. C. 365. (Ar., 12 to 30.)

The suit was brought pursuant to paragraph (2) of Section 16 of the Interstate Commerce Act, (34 Stat. L., 584; 36 Stat. L., 539; 41 Stat. L., 491).

The complaint, filed before the Commission July 2, 1923, alleged that the joint through rate of 37 cents per hundred pounds on newsprint paper, in carloads, from Thorold, Ontario, to New York City, in effect prior to July 1, 1922, was unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and that the proportion of that rate received by the carriers which performed the transportation within the United States was also unjust and unreasonable. Allegations were also made that the said rate was unjustly discriminatory and unduly prejudicial, in violation of Section 3 of the Interstate Commerce Act. It was further alleged that the rate of 33.5 cents per hundred pounds in effect on and after July 1, 1922, was likewise in violation of Sections 1 and 3 of the Interstate Commerce Act.

After full hearing the Commission found that the 37-cent rate prior to July 1, 1922, and the 33.5-cent rate in effect on and after said date were unjust and unreasonable to the extent that the same exceeded 32 cents from the period August 26, 1920, to June 30, 1922, and to the extent that it exceeded 29.5 cents per hundred pounds for the period subsequent to June 30, 1922, and that the complainant had been damaged by reason of said unlawful rates in the amount that the charges paid on shipments delivered, or tendered for delivery, subsequent to July 2, 1921, exceeded the charges which would have accrued at the rates found reasonable.

In its report on rehearing, dated October 17, 1925, the Commision adhered to its decision of November 25, 1924.

The case was submitted to the District Court on the petition of the plaintiff in error (Tr., 1-30, inclusive), to which the defendants demurred on the ground that the order of the Commission, on which the suit is based, is "null and void for want of jurisdiction because the said order deals solely with transportation charges on newsprint paper consigned from a point or points in the Dominion of Canada to a point or points in the United States." (Tr. 30.)

The District Court sustained the demurrer, the suit was dismissed, and judgment rendered in favor of the defendants and against the plaintiff for costs. The plaintiff thereupon perfected its appeal by writ of error to the United States Circuit Court of Appeals for the Seventh Circuit. The cause was fully heard and argued in that court and the subscribing judges ordered that the statement of facts and four questions be certified to this court in pursuance of the Act of Congress in such cases made and provided (Tr., 1-31). No opinions were delivered in the courts below.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the District Court sustaining the demurrer, dismissing the petition and requiring plaintiff to pay costs is contained in transcript pages 30 to 31.

The question of the jurisdiction of the Interstate Commerce Commission to award damages for violation of the Interstate Commerce Act by reason of the collection of an unjust and unreasonable joint through rate from a point in Canada to a point in the United States, was raised before the Interstate Commerce Commission and is discussed in its report and opinion (Tr., 12, 19, 27).

The demurrer of the defendants is based primarily on the alleged lack of jurisdiction in the Commission because the order of reparation deals solely with transportation

charges on newsprint paper consigned from a point or points in the Dominion of Canada to a point or points in the United States (Tr., 30). The questions certified by the judges of the Circuit Court of Appeals are four in number (Tr., 31-32), and are transmitted in accordance with section 239 of the Judicial Code, which provides that in any case in the Circuit Court of Appeals the court, at any time, "may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the case." The case is, therefore, properly before this court, which has full jurisdiction to answer the questions certified.

STATEMENT OF THE CASE.

The complaint before the Interstate Commerce Commission was filed July 2, 1923 (Tr., 6-11), and alleges that the joint through rate of 37 cents uper hundred pounds effective August 26, 1920, and of 33.5 cents per hundred pounds effective July 1, 1922, for the transportation of newsprint paper, in carloads, from Thorold, Ontario, Canada, to New York City, New York, had been, were and would be, until changed, unjust, excessive and unreasonable in violation of Section 1 of the Interstate Commerce Act. It was further alleged that the rates or portions of rates maintained and applied by the defendants for that portion of the transportation from Thorold to New York City which is within the United States was likewise in violation of Section 1 of the Act.

It was further alleged that the rates complained of were discriminatory against and unduly prejudicial to the complainants when compared with other rates charged by the defendants set forth in paragraph V of the complaint (Tr., 9).

It was further alleged that during the period of two years prior to the filing of the complaint the complainant had shipped numerous carloads of newsprint paper

from Thorold, Ontario, Canada, to New York City, New York, on which freight charges had been paid in accordance with the rates complained of, that additional shipments would be made, and that the charges paid and to be paid for the transportation had damaged complainant in a sum exceeding $15,000.00. Hearing was demanded and an order sought prescribing rates for the future, and also requiring the defendants to pay such sum to the complainants by way of reparation for the unlawful charges as the evidence might require.

Full hearing was had and the report of the Commission, by Division 3, found the rates complained of to be unreasonable, (Tr., 12-24), Chairman Hall dissenting.

On petition of defendants, the proceeding was reopened for further oral argument and upon reargument before the entire Commission the prior report, finding the rate from Thorold, Ontario, to New York, unreasonable, was affirmed (Tr., 25-27), Commissioners Hall, Woodlock and Cox dissenting.

The question of the Commission's jurisdiction to award reparation on shipments from a foreign country to the United States was considered by the Commission and it adhered to the decision which it had made in the case of *International Nickel Co.* v. *Director General,* 66 I. C. C. 627.

Thorold, Ontario, is located on the line of the Canadian National Railways, 444 miles from Hoboken, New York, and 443 miles from Manhattan Island (Tr., 19). Thorold is a local point on the Canadian National Railways, 30 miles from Black Rock, New York, where connection is made with the New York Central Railroad; Delaware, Lackawanna & Western Railroad and other railroads reaching New York, and is 12 miles from Suspension Bridge, New York, where connection is made with the New York Central; the Lehigh Valley, and other railroads serving New York. (Tr., 13.)

The shipments moved to Suspension Bridge and thence over the New York Central, or the Lehigh Valley; the distance from Suspension Bridge to New York over the New York Central is 447 miles, making the through distance over that route 459 miles (Tr., 13).

The 37-cent rate from Thorold to New York was maintained by the joint action of the Canadian and United States railroads on the full sixth-class basis and was divided 65 per cent, or 24 cents, to the United States carriers, and 35 per cent, or 13 cents, to the Canadian carriers. The 33.5-cent rate effective July 1, 1922, divided 25.1 cents to the United States carriers and 8.4 cents to the Canadian lines. (Tr., 19.)

The first commodity rate of 17.5 cents from Thorold to New York was established July 9, 1914, and was made up of a combination of the sixth-class rate from Thorold to Suspension Bridge of 4.5 cents, and the sixth-class rate of 13 cents from Suspension Bridge to New York. (Tr., 14.) By subsequent increase authorized by the Commission in the *Five Percent Case,* 32 I. C. C. 325, that rate became 18.5 cents, in the *Fifteen Percent Case,* 45 I. C. C. 303, the rate became 21 cents, and successively 26.5, 37 and 33.5 cents under the general percentage changes of 1918, 1920 and 1922, respectively. (Tr., 14.)

In the winter of 1921-22 the Canadian carriers proposed to the carriers in the United States that they concur in a joint rate of 31 cents on newsprint paper from Thorold to New York in place of the contemporaneous 37-cent rate conditioned upon a division which would increase somewhat, instead of reducing, the amount accruing to the Canadian carriers. A public hearing on the proposition was held but it failed to secure the aproval of a majority of the members of the association of carriers in the United States. (Tr., 14.)

The Commission found that in the general scheme under which rates from points in central freight association territory to New York are constructed, Thorold is in the group taking rates which are 78 per cent of the Chicago-New York rate; that if the Chicago-New York commodity rate had been continued and had been subjected to the general percentage changes which followed its cancellation, it would, at the time of the decision, have been 38 cents, and that rate, constructed on the basis of 78 per cent of the rate, would be 29.5 cents for application from Thorold to New York City. The original commodity rate on newsprint paper from Chicago to New York was 80 per cent of the contemporaneous sixth-class rate. A rate 80 per cent of the existing sixth-class rate of 37 cents from Thorold to New York would be 29.6 cents. Complainant sought a rate of 28 cents, which would be the rate of 31 cents proposed in the winter of 1921-22 by the Canadian National Railways, reduced 10 per cent.

The Commission found that on the question of reparation "the reasonableness of a joint rate as a whole must be considered," citing its decision in the *International Nickel Case*, 66 I. C. C. 627, 631, adding:

> "For reasons which will be set forth hereinafter, it does not appear necessary that we should now prescribe a separate rate for the future for that portion of the transportation which is in the United States." (Tr., 19.)

The Commission pointed out as to reparation that the contentions of the defendants that the Commission's jurisdiction was limited to the determination of the lawfulness of the amount received for transportation from the Canadian border to New York, was unsound, and held that the decisions in the *International Nickel Case* and a number of later cases were adverse to the defendants' contention and were controlling. The Commission did, however, set forth the defendants' showing on the propriety of the

amounts accruing for the transportation within the United States for the light it might throw on other features of the case. (Tr., 19.)

The Commission's specific finding in the present case is:

> "We find that the rate assailed was unreasonable from August 26, 1920, to June 30, 1922, inclusive, to the extent it exceeded 32 cents per hundred pounds, and that since June 30, 1922, it has been, is and for the future will be unreasonable to the extent it has exceeded, exceeds or may exceed 29.5 cents per hundred pounds. We further find that complainant, News Syndicate Company, Incorporated, received shipments under the rate assailed and paid and bore the charges thereon; that it has been damaged thereby in the amount that the charges paid on shipments delivered or tendered for delivery subsequent to July 2, 1921, exceeded those which would have accrued at the rate herein found reasonable; and that it is entitled to reparation with interest from defendants which engaged in the transportation of those shipments within the United States." (Tr. 23.)

On rehearing the Commission considered the claim of the defendants that measured by other rates the rate complained of was not unreasonable. The Commission pointed out, however, that of the various rates brought to its attention by the defendants as indicating the reasonableness of the rates from Thorold, that in effect from Niagara Falls afforded the best comparison, saying:

> "In point of distance, Thorold's nearest competing point is Niagara Falls, New York, about 12 miles away. The short-line distance from Niagara Falls to New York is 443 miles, 1 mile less than from Thorold. For about 97 per cent of the distance from Thorold shipments from that point moved over the same rails as those from Niagara Falls. It would seem, therefore, that the fairest basis of comparison is afforded by the rate of 26.5 cents on newsprint paper from Niagara falls to New York, and that a rate 3 cents higher from Thorold is ample to cover the extra service required involving use of an additional carrier and a crossing of the Niagara river." (Tr., 26.)

Reaffirming its jurisdiction to award reparation in such cases, the Commission affirmed its original findings without modification. (Tr. 27.)

These are all the pertinent facts which are necessary for a full consideration of the questions involved.

## QUESTIONS CERTIFIED.

1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission has made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can

a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the District Court err in sustaining the demurrer to the said petition? (Tr. 31-32.)

## BRIEF OF ARGUMENT.

### I.

**The Interstate Commerce Act applies to transportation between the United States and adjacent foreign countries to the extent that the Congress, under the Federal Constitution, has power to regulate such transportation.**

CONGRESS HAS THE POWER UNDER THE CONSTITUTION TO MAKE CARRIERS OPERATING IN THE UNITED STATES AND SUBJECT TO THE LAWS OF THE UNITED STATES LIABLE FOR DAMAGES RESULTING FROM THE EXACTION OF AN UNREASONABLE JOINT THROUGH RATE MAINTAINED BY THE JOINT ACTION OF THE AMERICAN AND CANADIAN LINES AND APPLIED TO A TRANSPORTATION SERVICE RENDERED FROM A POINT IN CANADA TO A POINT IN THE UNITED STATES.

*Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1.

THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE RATES FOR THE TRANSPORTATION OF PROPERTY BETWEEN THE UNITED STATES AND ADJACENT FOREIGN COUNTRIES WAS FULLY EXERCISED BY THE ENACTMENT OF THE INTERSTATE COMMERCE ACT.

*Interstate Commerce Act*, section 1, paragraph (1), (41 Stat. L., 474).

*Interstate Commerce Act*, section 1, paragraph (2), (41 Stat. L., 474).

*Interstate Commerce Act*, section 1, paragraph (5), (41 Stat. L., 474).

*Interstate Commerce Act*, section 8 (24 Stat. L., 379).

*Interstate Commerce Act*, section 9 (24 Stat. L., 379; 36 Stat. L., 539; 41 Stat. L., 484).

*Interstate Commerce Act*, section 14 (34 Stat. L., 584; 41 Stat. L., 484).

*Interstate Commerce Act*, section 16 (34 Stat. L., 584; 36 Stat. L., 539; 41 Stat. L., 491).

*(a) The Interstate Commerce Commission has uniformly upheld its own jurisdiction to award reparation for damages resulting from the application of an unreasonable joint through rate in the past from a point in Canada to a point in the United States.*

*Baer Bros. Mercantile Co.* v. *Denver & R. G. R. R. Co.*, 233 U. S. 479.

15 Ruling Case Law, 124.

15 Ruling Case Law, 130.

*International Nickel Co.* v. *Director General*, 66 I. C. C. 627.

*Broedel-Donovan Lumber Mills* v. *Director General*, 68 I. C. C. 96.

*American Cyanamid Co.* v. *Director General*, 69 I. C. C. 337.

*Arnhold Brothers* v. *Director General*, 69 I. C. C. 685.

*United States Graphite Co.* v. *Director General*, 88 I. C. C. 157.

*Texas & Pacific R. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

*Southern Pacific* v. *Railroad Commission* (California), 231 Pac. 28.

*(b) The courts have repeatedly construed the Interstate Commerce Act as applying to commerce between the United States and foreign countries.*

*United States* v. *Grand Trunk Ry. Co. of Canada*, 225 Fed. 283.

*Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357.

*Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U. S. 566.

*Armour & Co.* v. *United States*, 153 Fed. 1; affirmed 209 U. S. 56.

## II.

**The Interstate Commerce Commission and the courts can compel the payment of the damages here involved by the carriers operating within the United States, even though the Canadian carriers can not be reached.**

*Louisville & Nashville R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 70 L. Ed. (Adv. Ops.) 94.

*International Nickel Co.* v. *Director General*, 66 I. C. C. 627.

*Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 118 Fed. 613.

## III.

**The jurisdiction of the Interstate Commerce Commission does not depend on the form of rate publication.**

*C., N. O. & T. P. R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184.

*Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441.

*Minneapolis & St. Louis Ry. Co.* v. *Minnesota, ex rel. Railroad & Warehouse Commission*, 186 U. S. 257.

*Elkins Act*, 32 Stat. L. 847; 34 Stat. L. 584.

THE JOINT THROUGH RATE ASSAILED FOR THE TRANSPORTATION FROM THOROLD TO NEW YORK WAS CARRIED IN TARIFFS LAWFULLY ON FILE WITH THE INTERSTATE COMMERCE COMMISSION, AND SHIPPERS COULD NOT LAWFULLY PAY ANY OTHER OR DIFFERENT RATE.

*Interstate Commerce Act*, Section 6, Paragraph 7.
*Elkins Act*, Section 1 (32 Stat. L. 847; 34 Stat. L., 584).

*United States* v. *Grand Trunk Railway Co. of Canada*, 225 Fed. 283.

*Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357.

*Armour & Co.* v. *United States*, 209 U. S. 56.

THE WHOLE AMOUNT BY WHICH THE JOINT THROUGH RATE WAS UNREASONABLE ACCRUED TO THE CARRIERS OPERATING WITHIN THE UNITED STATES IN EXCESS OF THE AMOUNT WHICH WOULD HAVE ACCRUED TO SAID CARRIERS IF THE RATE FOUND REASONABLE BY THE COMMISSION HAD BEEN IN EFFECT.

## ARGUMENT

### I.

**The Interstate Commerce Act applies to transportation between the United States and adjacent foreign countries to the extent that the Congress, under the Federal Constitution, has power to regulate such transportation.**

**Congress has the power under the Constitution to make carriers operating in the United States and subject to the laws of the United States liable for damages resulting from the exaction of an unreasonable joint through rate maintained by the joint action of the American and Canadian lines and applied to transportation service rendered from a point in Canada to a point in the United States.**

The clause in the Constitution which authorizes Congress to regulate commerce is:

> "Congress shall have the power to regulate commerce with the foreign nations and among the several states and with the Indian tribes."

From the earliest days of our republic this court has interpreted this provision of the Constitution as conferring upon Congress full and complete power to regulate, in every particular, all commerce originating at or destined to a point in the United States, except that which moves wholly within the boundaries of a single state.

In *Gibbons* v. *Ogden*, 22 U. S. (9 Wheat.) 1, at pages 193 and 194, Mr. Chief Justice Marshall said:

> "To what commerce does this power extend? The Constitution informs us, to commerce 'with foreign nations, and among the several states and with the Indian tribes.' It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this

> power does not extend. It has been truly said, that commerce as the word is used in the Constitution, is a unit, every part of which is indicated by the term."

There can be no question but that under the Constitution the right inheres in Congress to provide a means whereby shippers injured by the exaction of an unreasonable through charge on transportation service from a point in Canada to a point in the United States may secure and collect damages therefor from such persons or corporations occasioning the injury as are subject to the sovereignty of the Federal government.

**The Constitutional power of Congress to regulate rates for the transportation of property between the United States and adjacent foreign countries was fully exercised by the enactment of the Interstate Commerce Act.**

The most cursory reading of the Interstate Commerce Act evidences the intention of Congress to exercise its regulatory power over rail transportation up to the very limit of its constitutional authority. Such words or phrases of limitation as may be used in the statutes are only such as are required by the provisions of the Constitution itself.

By paragraph (1) of section 1 of the act (41 Stat. L. 474), the provisions of the act apply to common carriers engaged in

> "The transportation of * * * property wholly by railroad * * * from any place in the United States * * * or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States."

By paragraph (2) of section 1 of the act the provisions of the act shall also apply

> "to such transportation of * * * property * * * but only in so far as such transportation * * * takes place within the United States, but shall not apply—
>
> (a) To the transportation of * * * property * * * wholly within one state and not shipped to or

from a foreign country from or to any place in the United States as aforesaid; * * *"

Paragraph (4) of Section 1 of the act makes it the duty of every common carrier subject to the act

> "engaged in the transportation of * * * property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates * * * and charges applicable thereto, and to provide * * *; and in case of joint rates * * * or charges, to establish just, reasonable and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Paragraph (5) of Section 1 provides:

> "All charges made for any service rendered or to be rendered in the transportation of * * * property * * * as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Paragraph (1) of Section 6 of the act (41 Stat. L., 483), requires:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act, and print and keep open to public inspection, schedules showing all the rates * * * and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * * when a through route and joint rate have been established. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act."

By paragraph (7) of Section 6 it is provided:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act, unless the rates * * * upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall

any carrier charge, or demand, or collect, or receive, a greater, or less, or different compensation for such transportation of * * * property, or for any service in connection therewith between the points named in such tariffs than the rates * * * and charges which are specified in the tariff filed and in effect at the time."

Section 8, (24 Stat. L., 379), of the act provides:

"That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act."

Section 9 of the act, (24 Stat. L., 379), provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may * * * make complaint to the Commission as hereinafter provided for * * *."

Section 13 of the act provides:

"That any person, firm, corporation, company or association * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty

of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

By Section 14 of the act it is provided:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

By Section 16 of the act it is provided:

"That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

**(a) The Interstate Commerce Commission has uniformly upheld its own jurisdiction to award reparation for damages resulting from the application of an unreasonable joint through rate in the past from a point in Canada to a point in the United States.**

The Interstate Commerce Commission, in so far as rate matters are concerned, has two main functions, the first of which is quasi-legislative in character, being the function to find present rates unreasonable and to prescribe for the future maximum reasonable rates; the second is quasi-judicial in character, and is the function of awarding damages to a shipper in compensation for injuries occasioned in the past by common carriers subject to the Act. In discussing the jurisdiction of the Commission, particularly in so far as rates between the United States and Canada are concerned, we must at all times remember that such functions are entirely separate and distinct and involve a determination of matters essentially different. So it was

held in *Baer Bros. Mercantile Co.* v. *Denver & R. G. R. R. Co.*, 233 U. S. 479, that there is no necessary connection between fixing a reasonable rate for the future and the finding that a rate in the past was reasonable to the damage of a shipper in a specified amount.

The defendants in error will undoubtedly cite many Commission cases in which it has refused to prescribe a joint rate for the future between Canada and the United States on the ground of lack of jurisdiction. Since the establishment of a joint rate for the future would involve action by carriers operating wholly within the Dominion of Canada, and since such carriers are not subject to the sovereignty of the Federal Government, the lack of jurisdiction in the Commission in such cases is obvious.

As is said in 15 Ruling Case Law, at page 124.

> "It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power."

And again at page 130:

> "Primarily the jurisdiction of a state or nation is co-extensive with its territorial limits. It has full and complete jurisdiction over all persons within its territory, and it is without authority to affect those who are beyond its boundaries."

The Commission, however, stands in an entirely different situation in awarding reparation for damages resulting from the application in the past of an excessive rate upon a shipment moving from Canada to the United States. Its function in such case is quasi-judicial. It has before it and subject to its jurisdiction the carriers operating within the United States without whose action and consent the

unreasonable joint through rate could not have been maintained. Consequently, the Commission from its earliest history has consistently held, in cases where the American and Canadian lines have in the past jointly undertaken to maintain an unreasonable and excessive through rate, that the shipper who complained to the Commission is entitled to an award of reparation. The leading decision on this point is *International Nickel Co.* v. *Director General,* 66 I. C. C. 627, decided February 14, 1922, where, at pages 628 and 629, the Commission said:

> "Prior to the hearing the Diretor General, as Agent, moved to dismiss the complaint on the ground that, since we have no jurisdiction to prescribe a joint rate for the future from a point in Canada to a point in the United States, we are without power to award reparation for damages growing out of the application of such a rate in the past. This motion was denied, but was renewed at the hearing and on brief. The Grand Trunk, the Canadian corporation defendant, by letter filed prior to the hearing also challenged our jurisdiction to award reparation against it for any portion of the charges which it received for the haul in Canada.
>
> The charging of an unreasonable rate is a tort,—*Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534, and the parties to such a rate are jointly and severally liable for any resulting damage. *Nicola, Stone & Myers Co.* v. *L. & N. R. R. Co.*, 14 I. C. C. 199; *Atlantic & Pacific Railroad* v. *Laird,* 164 U. S. 393, 399.
>
> Section 1 (5) of the Interstate Commerce Act provides:
>
> 'All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful * * *.'
>
> Section 8 of the act provides:
>
> 'That in any case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act

prohibited or declared to be unlawful, * * * such common carrier shall be liable to the person or persons injured thereby for the *full amount of damages sustained,* in consequence of any such violation of the provisions of this Act. * * *' (Italics ours.)

American lines parties to a joint rate from or to a point in Canada, the charges under which are unreasonable, 'cause to be done' or 'do' a thing (*i. e.,* the collection of unreasonable charges for the transportation of property) 'prohibited and declared to be unlawful' by the act, and are 'liable to the person or persons injured thereby for the full amount of the damage sustained.'

In *Black House Tobacco Co.* v. *I. C. R. R. Co.,* 17 I. C. C. 588, we said at page 590 what is equally applicable here:

'If the American line saw fit, it might doubtless name a rate to the Mexican border and in that event we could deal only with the service up to the Mexican line. Instead of adopting that course the American carriers, in connection with the Mexican carrier, established a joint charge for the entire service from the point in the United States to the point in Mexico, and gave no information as to the part of that charge which would accrue to the American roads. This does not relieve the American carriers from obligation to impose a reasonable charge for their service; it does make it impossible for the Commission to determine the reasonableness of that charge, except by examining the entire through rate.

Clearly, we have no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but we may require the American carriers to cease and desist from continuing to apply a joint through rate, or any rule, regulation, or practice in connection with that joint through rate, and we may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages in that behalf.'

In *Larrowe Milling Co.* v. *C., W. & L. E. R. R.,* 52 I. C., 145, we found the charges collected on certain shipments from Wallaceburg, Ontario, a point on the Chatham, Wallaceburg & Lake Erie to points in the

United States, to have been unreasonable and awarded reparation, saying:

'In so far as the matter of reparation is concerned, although we are without power to enforce an order against the Chatham, Wallaceburg & Lake Erie Railroad, if these railroads constituting a through route for traffic from a point in Canada to a point in the United States concurred in a through rate or a carload minimum that was unreasonably high, they are jointly and severally responsible for any damage that might result to any shipper on account of such unlawful rate or minimum.'

That finding was followed in *Monarch Paper Co.* v. *C. P. Ry. Co.*, 53 I. C. C. 620.

It is said that the amendments made by the transportation act, 1920, in section 1 of the Act to Regulate Commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry our territorial jurisdiction up to the international boundary line, at which that of Congress itself halts. Our territorial jurisdiction as to foreign commerce is thus co-extensive with that of the federal government. No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the Interstate Commerce Act has full effect, just as the Federal Control Act had effect when these shipments moved.

By section 1 of the Interstate Commerce Act it is declared that its provisions shall

> 'apply to common carriers engaged in the transportation of * * * property wholly by railroad * * * to any place in the United States * * * from a foreign country, but only in so far as such transportation * * * takes place within the United States,'

and

> 'shall also apply to such transportation of * * * property * * * but only in so far as such transportation * * * takes place within the United States, but shall not apply to the transportation of * * * property, or to the receiving, delivering, storage or handling of property, wholly within one State and not shipped * * * from a foreign country * * * to any place in the United States as aforesaid.'"

In addition to the cases cited in the quotation above, to the same effect are *Bloedel-Donovan Lumber Mills* v. *Director General,* 68 I. C. C. 96; *American Cyanamid Co.* v. *Director General,* 69 I. C. C. 337, 343; *Arnhold Brothers* v. *Director General,* 69 I. C. C. 685, and *United States Graphite Co.* v. *Director General,* 88 I. C. C. 157.

Defendants in error will undoubtedly argue that the phrase found in paragraphs 1 and 2 of Section 1 of the act, "but only in so far as such transportation or transmission takes place within the United States", limits the jurisdiction of the Interstate Commerce Commission to less than what might have been conferred upon it by Congress under the commerce clause of the Constitution. We respectfully assert that the statute is not capable of such a narrow construction.

The record fails to show any publication of a rate from the international boundary on newsprint paper in carloads to New York City. The suggested contention of the defendants ignores the fact that the law requires a publication either of a joint through rate or of the separately established rates. There are no rates of any sort applying from the international boundary line. The Commission acted upon the joint through rate in its entirety because there was no separately established rate from the boundary line. Clearly, if the joint through rate is without the jurisdiction of the Commission, there was no rate established by the defendants in the United States meeting the requirements either of Section 1 or of Section 6.

Prior to the establishment of Federal and State regulatory bodies, shippers clearly had an enforcible right at common law to enjoy rates which were not extortionate or discriminatory.

In *Texas & Pacific R. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 436, the court said:

> "And it may be further conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharges."

And in *Southern Pacific* v. *Railroad Commission* (California), 231 Pac. 28, 29, the Supreme Court of California, speaking to the time antecedent to the establishment of Federal and State regulatory bodies, said:

> "The authority of the courts in such matters was recognized as falling within their general jurisdiction."

In order that all shippers might secure uniform relief in such matters, the Supreme Court held in the *Abilene Cotton Oil Case, supra,* that, upon the establishment of the Interstate Commerce Commission, the forum in which the shipper might secure redress for such injuries was exclusively the Commission and was no longer the common law courts.

It is not to be assumed, and nowhere has it been intimated, that the purpose of Congress in establishing the Commission was to take away from shippers rights theretofore enjoyed by them. Rather, its purpose was to secure the shippers in the rights theretofore enjoyed by them; to confer additional rights upon them, and to provide a place where such rights might be enforced.

The Interstate Commerce Act, and acts depending thereon, deal with a great many more matters than the measure of the rate which may be assessed. Carriers subject thereto are obligated to file tariffs with the Commission; rebating is prohibited, and it is directed that rate adjustments be not unjustly discriminatory nor unduly prejudicial or preferential as between shippers. If the narrow construction of the act contended for by defendants in error is correct in dealing with reparation matters, it must be given the same narrow construction in respect to the matters

just stated. If so construed the American lines could join with their Canadian connections in joint through rates which need not be filed with the Interstate Commerce Commission. The way would be open to rebate on shipments transported upon such rates across the international border. Shippers, in respect of such transportation, could have no assurance against unjust discrimination and undue prejudice. These are but examples of the many respects in which commerce between Canada and the United States would be free from regulation if the defendants are correct in their contention.

It is not to be contemplated, however, that Congress intended to leave commerce between Canada and the United States free from regulation.

**(b) The courts have repeatedly construed the Interstate Commerce Act as applying to commerce between the United States and foreign countries.**

In *United States* v. *Grand Trunk Ry. Co. of Canada,* 225 Fed. 283, the defendant was indicted under the Elkins Act for rebating in respect of passenger fares charged a show company for a trip from a point in the United States through the Dominion of Canada to another point in the United States. Counsel for defendant urged that this did not constitute a violation of law because a portion of the trip was through the Dominion of Canada, alleging that to be valid the indictment should state that the payment of rebates was on the American portions of the journey. As to that the court said (blackface ours):

> "The question thus presented is perhaps not wholly free from difficulty, but it must be considered in connection with the intention of Congress to make provision for the transportation of commerce, not only between states and territories, but to and from foreign countries, and broadly for 'the whole field of commerce,' excluding intrastate. *Texas & P. R. R. Co.* v. *I. C. C.,* 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. The indictment is not open to the inference that the

transportation in question was for separate completed journeys in Canada. The offense consisted of a plan to divert passenger traffic to the lines of the defendant company which extended from points in the United States through Canada to other points in the United States. The question, however, of the payment of rebates or refunds on fares between points in Canada exclusively arises only as an incident of the entire transportation which originated in the United States, for the indictment, as I read it, substantially charges that the rebates were to be paid **from the aggregate fares for the entire journey** under an agreement devised to evade the statute. The route from Detroit to Boston was evidently regarded by the parties to the agreement as a theatrical circuit for shows of the Empire Circuit Company, and, athough stops were made along the way for the giving of performances, the idea no doubt was that the journey was to be practically continuable."

The court held the indictment good, and it is to be emphasized here that the rebate dealt with was from *the aggregate fares for the entire journey.*

In *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury,* 254 U. S. 357, Mrs. Woodbury was traveling from Timmins, Ontario, in Canada, to El Paso and return on a through ticket with stop-overs permitted. Some place between San Antonio and El Paso, Texas, the carrier lost her trunk and she brought suit for the value of the trunk and contents, which the jury found to be $500. The carrier insisted that it was not liable for more than $100, since it had duly filed with the Interstate Commerce Commission a tariff limiting its liability to that amount.

The question presented was whether the transportation of the lost property was subject to the Act to Regulate Commerce, although begun in a foreign country. At page 359 Mr. Justice Brandies said:

"But counsel for Mrs. Woodbury insists that solely because her journey originated in Canada, the provisions of the Act to Regulate Commerce do not apply. The contention is that Section 1 of the Act of 1887 does

not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger, but of property. *Boston & M. R. Co.* v. *Hooker, supra.* The second is that the act does apply to the transportation of both passengers and property from an *adjacent* foreign country, such as Canada. Section 1 declares that the act applies to 'any common carrier * * * engaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country.' A carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission. *International Paper Co.* v. *Delaware & H. Co.*, 33 Inters. Com. Rep. 270, 273, citing *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666."

In *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U. S. 566, the respondent brought suit to recover damages from the telegraph company resulting from the erroneous transmission of an unrepeated cablegram from Barcelona, Spain, to New Orleans. The message traveled over the lines of the Spanish government telegraph from Barcelona to Paris, and thence over lines of the French government to Havre, thence via the Western Union cable lines to New York and over its land lines to New Orleans. The Western Union rate from Havre to New Orleans was carried in its tariffs on file with the Commission, which limited its liability in respect of unrepeated messages to the charge made for tolls. The question presented was whether the sender without assent in fact to the limitation of liability, was, as a matter of law, bound thereby because that limitation was a part of the lawfully established rate.

Noting that the Act to Regulate Commerce included telegraph and cable companies engaged in sending messages between the United States and foreign countries, Mr. Justice Brandeis, at page 572, said:

> "And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the provisions of that act."

In *Armour & Co.* v. *United States,* 153 Fed. 1, affirmed 209 U. S. 56, was involved an indictment under the Elkins Act which forbids the granting and receiving of rebates in respect to transportation charges of any property by any common carrier subject to the Act to Regulate Commerce. The shipment involved moved by rail from Kansas City, Missouri, to New York City, and thence via steamer to Christiania, Norway. The shipper had contracted with the steamship line for space for the ocean voyage at a specific price. The shipper then contracted with the railroad carrier, under a through bill of lading, for transportation from Kansas City, Missouri, to Christiania, Norway, for a price of 12 cents per hundred pounds less than would be made up by adding to the steamer charges the railroad rates on file with the Interstate Commerce Commission.

Counsel for the shipper urged, since the transportation involved was under a through bill of lading from a point in the United States to a non-adjacent foreign country, that it was not subject to the Act to Regulate Commerce; that there was no requirement that the rates applicable thereto be published and filed with the Interstate Commerce Commission, and that there was no prohibition against rebating in respect of such rates. As to that the Circuit Court of Appeals for the Eighth Circuit speaking through Sanborn, C. J., said, at page 10 of 153 Fed.:

"It is contended that, although the act may apply to the carriage of property in foreign commerce when consigned from a place in the United States to the port of transshipment for export, to be there again consigned to its destination in the foreign country, yet it has no application to the transportation of such property under a through bill of lading from the place of the origin of the carriage to the foreign destination. The proposition cannot be sustained. The act is general, comprehensive, includes within its express terms all transportation of property in foreign commerce from the place of origin in the United States to the port of transshipment, and it contains no exception of such carriage under through bills of lading."

And at page 12 said:

"If those rates are separate from the ocean rates they may undoubtedly be separately filed and published, and the ocean rates may be added to make aggregate through rates, as was done in the case under consideration. If by agreement or arrangement between the inland and the ocean carriers or by common control the inland rates become parts of joint through rates, then the latter rates become the rates of transportation to or from the ports of transhipment from or to the places of the origin or destination of the traffic in the United States, and they thereby fall within the terms and reason of the law."

When the case reached the Supreme Court of the United States, Mr. Justice Day, dealing with the same question, said (blackface ours):

"It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original interstate commerce act, and that its terms do not include such shipments. Analyzing the 1st section of the Act (24 Stat. L. at 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), it is said that it applies to the following kinds of commerce: (a) Interstate Commerce; (b) commerce between the United States and an *adjacent* foreign country; (c) commerce between places in the United States passing through a foreign country; (d) **commerce from the**

**United States to a foreign country, only while being transported to a point of transshipment;** (e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign country. And it is contended that sec. 6, as amended (25 Stat. at l. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of section 1 of the original act of 1887, and in the declaration of the scope and purpose of the act, declared in its title. *Texas & P. R. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 211, 40 L. ed. 940, 944, 5 Inters. Com. Rep. 405, 16 Sup Ct. Rep. 666. There is no attempt in the language of the Act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? **Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading."**

We have above pointed out that the construction contended for by defendants in error would free from the restrictions of law all commerce of a nature similar to that here under consideration.

## II.

**The Interstate Commerce Commission and the courts can compel the payment of the damages here involved by the carriers operating within the United States, even though the Canadian carriers cannot be reached.**

As we have above observed, the Interstate Commerce Commission has no jurisdiction over the Canadian carriers which operate on the other side of the international boundary line, because the Federal government itself has no jurisdiction there. That fact, however, does not militate against its jurisdiction to award reparation for the entire amount of damage against the carriers operating within the United States.

The shipper's right to enjoy reasonable rates is not contractual because the amount to be paid for transportation, as a matter of contract, is fixed by the tariffs of the carrier lawfully on file with the Interstate Commerce Commission, and no matter how grossly excessive may be the rate published therein, the shipper, under the law of contract, is obligated to pay it.

The fact is that a carrier which exacts an unreasonable rate is guilty of a tort, that tort being a violation of Section 1 of the Interstate Commerce Act, and this cause, being a proceeding to recover reparation awarded by the Commission, is a tort action.

Where a tortious act has been committed by more than one person, it is a well accepted rule that complete recovery for the entire injury may be had from any one of several parties to the act. This has been specifically held by this court in a suit on a reparation order.

In *Louisville & Nashville R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 70 L. ed. (Adv. Ops.) 94, a shipper sued on a reparation order. The Louisville & Nashville Railroad Company

was the initial carrier in respect of the shipments involved and was made a party defendant in the proceeding before the Commission. Certain connecting carriers were not made parties, however, although such connecting carriers participated in the transportation under joint through rates. The Commission awarded the full amount of reparation against the Louisville & Nashville Railroad Company as measured by the difference between the joint through rate charged and the joint through rate found reasonable. A suit being brought to enforce the order, the Louisville & Nashville contended that the liability of itself and the connecting carriers was not joint and several, but that each was liable individually for that part of the excess unlawfully exacted.

That is very similar to the contention of the defendants in error here, who say their liability is restricted to the portion of the rate received by them under a private agreement with the Canadian carrier.

Regarding the contention of the Louisville & Nashville, this court, speaking through Mr. Justice Brandeis, said, at page 99:

> "The liability for exacting unlawful charges is joint and several."

And at page 101:

> "The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable *in solido* like every other joint tortfeasor."

It is particularly noteworthy that on page 100 the court said:

> "The Commission held early, and has consistently held since, that carriers who by means of a joint through rate make excessive charges are liable jointly and severally for all the damage sustained."

And in support of the statement just quoted, cited with approval a dozen or more decisions by the Interstate Commerce Commission, including, among others, the *International Nickel Case, supra,* which we have above referred to as the leading case in respect of the Commission's jurisdiction in reparation proceedings involving joint rates between the United States and an adjacent foreign country.

In *Interstate Commerce Commission* v. *L. & N. R. Co.,* 118 Fed. 613, the Interstate Commerce Commission sought to enjoin certain carriers from assessing rates higher than those found lawful by it. As to the treatment which should be accorded the various defendant carriers which participated in the joint through rates, the court, at page 625, said (blackface ours):

> "In this case an injunction will be granted against each and all of the respondent companies, so that the order of the Commission may be enforced. This is made necessary by the fact that the rates to Savannah, which are declared to be unreasonable and prejudicial, are joint through rates of all the defendants. **Such rates must be construed as entireties.** It follows, necessarily that each carrier who is a member of the through line must be regarded as severally as well as jointly responsible for the unfair and oppressive rate. **While this unfairness appears to be attributable to the exactions made by the Louisville & Nashville, the other members, by their assent, are joint participants in the wrong.**"

We submit that the principles enunciated in cases just cited make it clear that the Commission did not exceed its jurisdiction in awarding reparation to the plaintiff against the carriers in the United States despite the fact that it can not compel the participation in the payment thereof by the Canadian lines.

## III.

### The jurisdiction of the Interstate Commerce Commission does not depend on the form of rate publication.

The defendants in error argued that the Interstate Commerce Commission has no jurisdiction over a joint through rate from a point in Canada to a point in the United States which is published and maintained by the joint action of Canadian and United States carriers. If the portion of the rate which accrued to the carriers in the United States was published specifically as a separate charge to be applied to the transportation from the boundary line to the City of New York, they apparently would concede the jurisdiction of the Commission.

Reduced to its simplest terms, this is an argument that the jurisdiction of the Commission depends upon the form in which the through charge is published in the tariffs of the carriers, it being asserted that if the charge is published in one sum to cover all services rendered on both sides of the international border, the Commission has no jurisdiction, and that the Commission only has jurisdiction when the charge is published in two sums, one to apply to the services rendered in Canada and one to apply to the services rendered in the United States.

The courts have universally held, however, that the jurisdiction of the Commission is not dependent upon the form in which charges are published and maintained.

In *C., N. O. & T. P. R. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, was involved the validity of an order of the Interstate Commerce Commission relating to the transportation of freight from Cincinnati, Ohio, to certain destinations in Georgia. One of the defendants, *i. e.*, the Georgia Railroad Company, operating wholly within the State of Georgia, assessed for the transportation service performed over its line its full local charges, and in

behalf of that carrier it was urged that, being wholly within the state and exacting simply its regular local rate, it did not come within the scope of the act. At page 192 the court said:

> "But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading and to participate in through rates and charges, it thereby becomes part of a continuous line, not made a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce.
>
> * * * * * * * *
>
> Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points."

In *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, was involved a proceeding instituted by the Interstate Commerce Commission to compel obedience to its order requiring the carriers to desist from charging an increased freight rate on lumber. The particular rate involved applied from shipping points in the states of Louisiana, Mississippi and Alabama to the Ohio River crossings and was a separately stated rate factor to apply on lumber to be transported beyond the crossings. As to the Commission's power over through charges, the court at page 465 said (blackface ours):

> "It is said that it was error to hold the advance unreasonable and unjust because the charges made on lumber to Cairo and other points on the Ohio River 'are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the Circuit Court has any jurisdiction to determine.' Indeed, it is said, to do so is an exercise of a legislative function. We think the contention is in effect answered by *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Com-*

*merce Commission*, 162 U. S. 184; 40 L. ed. 935; 5 Inters. Com. Rep. 391; 16 Sup. Ct. Rep. 700. If the contention is intended to be as extensive as its words seemingly make it, it would withdraw from the supervision of the Interstate Commerce Commission and from the courts every shipment over two or more railroads. There necessarily must be some apportionment of the rates between such roads, and whether the advance should be made in the rates over one road or the other, or in the rates over all, can make no difference. **In other words, it is competent for the Commission or the courts to consider the through rate, however composed.**"

See also *Minneapolis & St. Louis Railway Company* v. *Minnesota ex rel. Railroad & Warehouse Commission*, 186 U. S. 257.

**The joint through rate assailed for the transportation from Thorold to New York was carried in tariffs lawfully on file with the Interstate Commerce Commission and shippers could not lawfully pay any other or different rates.**

The Elkins Act (32 Stat. L. 847; 34 Stat. L. 584), as well as Section 6 of the Interstate Commerce Act, makes it unlawful for any carrier to exact any other or different rate than that named in its published tariffs; it is likewise unlawful for the shipper to pay for the transportation of his freight any other or different rate than that named in the published tariffs. If the Interstate Commerce Commission had no jurisdiction to enforce an award of reparation in the measure of damages suffered by reason of the unlawful publication of an unlawful joint through rate, then the way is open to the carriers to publish whatever joint rates they see fit for transportation between a point in Canada and a point in the United States and to give some shippers or receivers of freight a different rate. If the Commission can not pass upon the lawfulness of the rate, it can not prosecute the shipper for paying less than the published rate or the carrier for paying rebates out of the published rates, or for collecting other and different rates than those named in the published tariffs.

This court, shortly after the passage of the Interstate Commerce Act, laid down the principle of construction of that statute which would effectuate the purposes that Congress had in mind. These were the establishment of just and reasonable rates, and equal treatment of all by the carriers. The construction which we herein urge, and which was adopted by the Interstate Commerce Commission in its determination of the issue in this case, gives assurance that the great remedial purposes of the Interstate Commerce Act apply not only to transportation between points within the United States but to the transportation of traffic between points in Canada and points in the United States.

Full and complete power to regulate requires that the jurisdiction exercised by the Commission lie with that body. There is no attempt in the language of the act to exempt from the Commission's jurisdiction, in awarding damages for violations of the act, traffic moving from Canada to the United States on a joint through rate. The construction contended for by the defendants would place this important commerce outside the restrictions of the law and make it possible for carriers to indulge in all of the practices which required the enactment of the Interstate Commerce Act. That this would be so is evident from the decisions in *United States* v. *Grand Trunk Ry. Co. of Canada*, 225 Fed. 283; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357, and *Armour & Co.* v. *United States*, 209 U. S. 56, commented upon above.

**The whole amount by which the joint through rate was unreasonable accrued to the carriers operating within the United States in excess of the amount which would have accrued to said carriers if the rate found reasonable by the Commission had been in effect.**

As between the plaintiff in error and the defendants in error, the charge set forth in the tariffs which was demanded and paid was a single rate and covered the entire

transportation service rendered from Thorold, Ontario, Canada, to New York City, New York. As between themselves, the carriers operating in Canada and the carriers operating in the United States had a private agreement respecting the portions in which the through rate was divided. The findings made by the Commission respecting the divisions of that joint through rate clearly indicate that the through rate found unreasonable was excessive solely because carriers operating within the United States received an excessive division thereunder.

The facts supporting this statement are shown in the findings of the Commission contained in its original report and may be summarized as follows:

Prior to July 1, 1922,* the rate found unreasonable by

*On this date the Commission, in *Reduced Rates*, 1922, 68 I. C. C. 676, ordered that all rates subject to its jurisdiction be reduced 10 per cent.

the Commission was 37 cents per hundred pounds and was a joint through rate published and maintained by a common agreement between the Canadian and American lines. As the Commission notes on page 67 of its original report, the Canadian lines, in the winter of 1921-22 proposed to the American lines that they concur in a joint Thorold-New York rate of 31 cents in place of the contemporaneous 37-cent rate. The American lines, however, refused to concur in the reduction. (Tr., 14.)

When all rates were reduced 10 per cent on July 1, 1922, the rate in question became 33.5 cents, and in the proceeding before the Interstate Commerce Commission, as is noted on page 70 of the Commission's original report, complainant contended that the rate should be fixed for the period subsequent to July 1, 1922, at 28 cents, which would be the equivalent of the Canadian lines' proposal in 1921-22 less 10 per cent. (Tr. 17.)

The Commission, however, found that the rate for the period just mentioned was unreasonable only to the extent it exceeded 29.5 cents. It not only awarded reparation on that basis but stated that it would expect the rate to be published for the future by the American lines, particularly as the Canadian lines stated at the hearing that they would be willing to participate therein on a joint through basis. (Tr. 23.)

It should be emphasized that the plaintiff in error would have enjoyed during the reparation period a joint through rate even lower than that found reasonable by the Commission but for the refusal of the lines within the United States to join in such a lower rate.

It appears from the Commission's report that rates on newspaper print in the territory involved were originally based on a rate maintained from Chicago to New York, and that while that rate was no longer specifically maintained, the entire adjustment still reflected its influence. Thorold, Ontario, Canada, is in a group which commonly takes 78 per cent of rates published on similar commodities from Chicago to New York, and if that percentage be applied to the old Chicago-New York newsprint paper rate brought down to date by the various percentage advances and reductions as reflected in other adjustments throughout the territory, it would produce from Thorold to New York a rate of 29.5 cents, the identical figure found reasonable by the Commission. (Tr. 17.)

It also appeared that the Chicago-New York rate referred to was made 80 per cent of the contemporaneous sixth-class rates; that the present sixth-class rate from Thorold to New York is 37 cents and a rate of 80 per cent thereof would be 29.6 cents—again almost exactly the figure found reasonable by the Commission. (Tr. 17.)

As has been said, the rate in question was a joint through rate published in the tariffs in a single amount by the joint agreement of the Canadian and American lines.

By private agreement between themselves, however, the American lines and the Canadian lines had agreed on the proportion each was to receive out of the rate. Those proportions, as set forth in the Commission's original report, are exceedingly interesting as showing that the unreasonableness of the rate assailed was solely occasioned by the fact that the proportion accruing to the American lines was excessive.

First, it should be remembered that the rate fixed as reasonable by the Commission was 80 per cent, if taken to the nearest half cent, of the joint sixth-class Thorold to New York rate of 37 cents. The proportion which the Commission found accrued to the American lines out of that 37-cent sixth-class rate is 24 cents. (Tr., 19.) Eighty per cent of 24 cents would produce a figure of 19.2 cents, as the proportion to accrue to the American lines out of a rate made 80 per cent of the sixth-class rate and divided in the same proportion as the sixth-class rate is divided. It was also found by the Commission that out of the 33.5-cent rate assailed, the American lines received 25.1 cents (Tr., 19), or 5.9 cents more than they would receive out of the 29.5-cent rate divided on the basis above described. In other words, out of the rate assailed, the American lines were receiving 5.9 cents more as their proportion for the transportation services performed by them within the United States than they would have received had the joint through rate been made on the usual basis of 80 per cent of the joint through sixth-class rate, and had such rate been divided as between the Canadian and American lines in the same relative proportions as the sixth-class rate was divided. The actual reduction in the through rate prescribed by the Commission was, however, but 4 cents (from 33.5 to 29.5 cents), and it thus appears that the unlawful portion of the 33.5-cent rate was solely occasioned by the fact that the American lines received an excessive division or portion thereof.

Under these circumstances, although the Commission's specific finding of unreasonableness was directed to the joint through rate, the other findings in the Commission's decision indicate that no smaller amount of damages would have been awarded if the Commission had directed its attention solely to the divisions of the rate.

## CONCLUSION

With the foregoing discussion of the principles of law involved, we come now to consider what answer should be given to the questions certified by the judges of the United States Circuit Court of Appeals. For convenience we here restate question No. 1:

> 1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

We have demonstrated that it is the duty of the carriers transporting property from a point in Canada to a point in the United States either to establish a rate from the boundary to the destination in the United States, or to establish joint through rates which meet the test of reasonableness. The shipper was not permitted to pay for transportation from the boundary, but was compelled to pay the joint through rate because that is the only rate and only form of publication which, under the law, could be applied to the movement of newsprint paper from Thorold to New York. On complaint against the United States railroad alone for a violation of section 1 of the Interstate Commerce Act, the question to be determined is, was more

charged for the transportation than was just and reasonable under the circumstances of record? Such an issue is clearly within the power of the Commission to determine. Before it could ascertain the amount of the damage which had been suffered, it must determine to what extent, if any, the amount paid for the entire transportation as a unit exceeded what is just and reasonable. This question, therefore, should be answered, "Yes."

The second question is as follows:

> 2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

We have already seen, as an answer to question No. 1, that the Commission has jurisdiction to determine the reasonableness of the joint through rate. If the Commission finds the rate to be unreasonable and unjust, then the next step by the Commission is to determine the amount of the damage occasioned by the charging of an unreasonable rate. In the absence of any other elements of damage, it follows under the law and under the decision of this court in *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company*, 245 U. S. 531, that the amount of the damage is measured by the difference between what is just and reasonable and the amount exacted by reason of the publication of the tariff. The Interstate Commerce Act makes the carrier re-

sponsible for any damages suffered by any shipper by reason of any act committed in violation of the Interstate Commerce Act. The wrong done was the publication of an excessive joint through rate. If the Commission is to have any effective power in cases, it must have jurisdiction to make an order for the payment of damages measured by the difference between the rate paid and what would have been a just and reasonable rate. Therefore, the answer to question No. 2 should be, "Yes."

The third question is as follows:

> 3. When the Interstate Commerce Commission has made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

Under the circumstances shown of record in this case, it clearly appears that the Canadian carrier was willing to publish a joint through rate less even than that found reasonable by the Commission in the present case. The entire damage, therefore, suffered by plaintiff was occasioned by the refusal of the carriers in the United States to join in a joint through rate on a reasonable basis, and as well to their failure to publish a reasonable rate from the Canadian boundary to New York City on newsprint paper originating at Thorold, Ontario. We have already seen that in various cases notably in the *Sloss-Sheffield case, supra,* this court has held that the liability for exacting unlawful charges is joint and several, and that the liability arises out of the wrongful exaction from the shipper not out of the unlawful receipt or unjust enrichment by the carrier. It was further held that every carrier who participates in the infliction of this wrong is liable *in solido* like every other joint *tort feasor.*

This has been the principle which the Interstate Commerce Commission has uniformly followed. In the present

case the joint through rate was published solely because of the act of the American cariers. The money was collected by the United States carriers. They are the only parties who are within the jurisdiction of the United States and, therefore, the Commission has abundant authority in its order for the payment of damages to make such requirement solely against the United States carriers. The answer, therefore, to the third question should be, "Yes."

The fourth question is as follows:

4. Did the District Court err in sustaining the demurrer to the said petition.

As we understand the contention of the defendants, at least in the court below, the only grounds urged for sustaining the demurrer were that the Commission was without power to make an award of damages against the American carriers upon a finding that the joint through rate was unjust and unreasonable to the extent that it exceeded a just and reasonable rate of 32.5 cents or 29.5 cents per hundred pounds. We know of no other objection urged against the petition than the one just stated. In as much as the Commission has, as we have just shown, full power to make the order complained of, the District Court erred in sustaining the demurrer, which went solely to the question of power by the Commission. The answer, therefore, to the fourth question should be, "Yes."

Respectfully submitted,

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FILED
SEP 28 1917

# Supreme Court of the United States

OCTOBER TERM, 1917.

No. 355.

NEWS SYNDICATE COMPANY, INCORPORATED,
*Plaintiff-in-Error,*
vs.
THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
*Defendants-in-Error.*

## BRIEF FOR DEFENDANTS-IN-ERROR

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D. The Commission has itself recognized this limitation of the application of the Act and of its jurisdiction, except in recent reparation cases. 27

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# Supreme Court of the United States

OCTOBER TERM, 1927

No. 235

NEWS SYNDICATE COMPANY, Incorporated,
*Plaintiff-in-Error,*

*vs.*

THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
*Defendants-in-Error.*

## BRIEF FOR DEFENDANTS-IN-ERROR.

THERE HAS BEEN NO OFFICIAL REPORT OF OPINIONS IN THE COURTS BELOW.

### Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

This case comes to this court on a certificate to it by the Circuit Court of Appeals for the Seventh Circuit, of four questions upon which the advice and instruction of this court is desired. The case went to the United States Circuit Court of Appeals for the Seventh Circuit on appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division, sustaining the demurrer of the defendants-in-error (defendants below) to the petition of the plaintiff-in-error, and dismissing the action at the cost of the plaintiff-in-error.

This judgment was entered on July 26, 1926; appeal

to the United States Circuit Court of Appeals for the Seventh Circuit was taken on October 4, 1926; and the four questions were certified to this court on May 4, 1927. (Certificate [hereinafter called cer.] p. 32.)

The statutory provision under which the jurisdiction of this court is invoked is Section 239 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. L. 938).

## Statement of the Case.

The plaintiff-in-error receives shipments of newsprint paper in carloads at New York City shipped to it from Thorold, Ontario. These shipments are transported from Thorold by the Canadian National Railway to either Suspension Bridge, New York, or Black Rock, New York (generally to the former) and there delivered to one of the United States railroads, defendants-in-error here, for transportation thence to New York City. The shipments move on through bills of lading consigning them directly from Thorold to New York. The distance from Thorold to Suspension Bridge is 12 miles and from Thorold to Black Rock is 30 miles. From Suspension Bridge and Black Rock to New York City the lengths of the hauls performed by the American carriers range from 414 miles to 447 miles. (Cer., p. 13.)

For the transportation of this newsprint paper, the Canadian National and the American carriers published a so-called joint through rate covering the entire through transportation service from Thorold to New York. This rate was published in tariffs filed both with the Canadian Railway Board and the Interstate Commerce Commission, the tariffs being concurred in by all of the carriers participating in the transportation, as required by the Interstate Commerce Commission's rules governing the publication and filing of tariffs. From 1920 to 1922 this rate was 37

cents per hundred pounds, and in 1922 it was reduced to 33.5 cents per hundred pounds. (Cer., p. 14.)

In June, 1923, the plaintiff-in-error, together with the Ontario Paper Company, Ltd., the shipper, and the parent corporation of both of these companies, filed a complaint with the Interstate Commerce Commission alleging, first, that the joint through rate of 37 cents prior to 1922 and 33.5 cents thereafter, had been and for the future would be unreasonable in violation of Section 1 and unduly prejudicial in violation of Section 3 of the Interstate Commerce Act, and, second, that the portions thereof for the transportation within the United States were and had been likewise unreasonable and prejudicial. (Cer., pp. 8, 9 and 10.) A hearing on this complaint was had before the Interstate Commerce Commission. While the Canadian National Railway was made a party to the complaint, it did not appear at the hearing, except to assert that it would not participate in reparation if any should be awarded. (Cer., p. 23.) The American carriers, defendants-in-error here, denied the jurisdiction of the Commission except over that part of the transportation taking place within the United States. (Cer., p. 19.) Evidence was produced by both sides bearing upon the reasonableness of the joint through rates, the American carriers producing this without waiving their objection to the Commission's jurisdiction. The American carriers likewise produced evidence that the portion of the through rate of 33.5 cents received by them for the part of the transportation service performed by them in the United States was 25.1 cents per hundred pounds, and produced evidence to prove that this charge was not an unreasonable charge for that part of the transportation service performed by them within the United States. The defendants-in-error asked the Commission to make a finding upon the question of the reasonableness of this portion of the charge. (Cer., pp. 19, 20.)

On November 25, 1924, the Commission, by Division 3 thereof, filed its report in which it held that it had jurisdiction to pass upon the reasonableness of the joint through rate, refused to make a determination as to the reasonableness of the portion of the charge for the transportation within the United States as requested by the defendants (Cer., p. 19), and found that the joint through rate of 37 cents had been unreasonable to the extent that it exceeded 32 cents, and that the rate of 33.5 cents had been and for the future would be unreasonable to the extent that it exceeded 29.5 cents. It also found that the plaintiff had been damaged in the amount that the joint through rates charged exceeded the rates found reasonable, and that it was entitled to an award of reparation on past shipments in such amount (Cer., p. 23).

The defendants applied for a reargument, which was granted, and on October 17, 1925, the Commission announced its report upon such reargument, affirming its previous decision upholding its jurisdiction with respect to the joint through rates and declining to make a determination of the reasonableness of the portions thereof for the transportation within the United States (Cer., pp. 25-30).

Thereafter, the plaintiff presented proof of the shipments made by it, and on January 11, 1926, the Commission made its reparation order directing the various carriers to pay to the plaintiff the amounts therein stated, with interest thereon, such amounts representing the amounts by which the joint through rates collected on the plaintiff's shipments had exceeded the charges on the basis of the joint through rates found reasonable by the Commission (Cer., pp. 4, 5).

The American carriers refused to comply with the reparation order, believing it beyond the Commission's jurisdiction, and on March 26, 1926, the plaintiff instituted this suit by filing its petition in the District Court of the United

States for the Northern District of Illinois, Eastern Division, in which it set forth the reports and reparation order of the Interstate Commerce Commission and prayed judgment for the amount of the reparation awarded (Cer., p. 1). This suit was brought solely against the American carriers. The defendants demurred to the petition on the ground that the reparation order of the Commission was invalid (Cer., p. 30). The District Court sustained the demurrer and gave judgment for the defendants (Cer., p. 31). From this judgment the plaintiff appealed to the Circuit Court of Appeals. After argument before that court, the four questions hereinafter set forth were certified by it to this court.

The questions of law presented must be determined solely in the light of the following essential facts: that the Commission attempted to pass upon the reasonableness only of the joint through rates covering transportation both in Canada and in the United States; that it purported to find these joint through rates unreasonable and award reparation for the entire amount by which they exceeded rates found to be reasonable; that it failed and refused to make a determination of the reasonableness of that part of the through rates covering the portion of the transportation performed within the United States, although requested to do so by both parties, and although there was evidence before it as to this portion of the charges and bearing upon the reasonableness thereof; that the Commission in making its decision did not have before it and subject to its jurisdiction the Canadian carrier participating in the joint through rate and in the transportation involved; and finally, that this suit for the entire amount of the reparation is brought solely against the American carriers.

## Questions Certified.

1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission has made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under Section 16 of the Interstate

Commerce Act, be maintained solely against the United States carrier?

4. Did the District Court err in sustaining the demurrer to the said petition?

In connection with these questions, it should be pointed out that they may not with entire accuracy reflect the facts involved, in that the complaint to the Interstate Commerce Commission was not made against the United States railroads alone, but against both the United States and the Canadian carriers, although the Canadian carrier refused to appear before the Commission and denied the Commission's jurisdiction; and further, in that the reparation order of the Commission by its terms purports to be directed both to the Canadian and the American carriers, although whether it has been served upon the Canadian carrier does not appear.

## Summary of Argument.

I. With respect to transportation from a point in Canada to a point in the United States the jurisdiction of the Interstate Commerce Commission extends only to the portion thereof within the United States, and it is without jurisdiction, on the complaint of a shipper or consignee, to determine the reasonableness of a joint through rate covering the transportation both in Canada and in the United States.

A. The Commission's jurisdiction in a complaint proceeding is limited to the enforcement of the provisions of the Interstate Commerce Act.

Section 13 of Interstate Commerce Act provides for complaint only "of anything done * * * in contravention of the provisions" of the Act.

Sections 15 and 16 of Interstate Commerce Act authorize Commission to make findings and orders only with respect to violations of provisions of the Act.

The collection of unreasonable rates is a violation of the Act only to the extent that the provisions of the Act apply to the transportation and require the maintenance of reasonable rates.

B. In the case of transportation from a point in Canada to a point in the United States, the provisions of the Interstate Commerce Act apply only to the portion of such transportation taking place within the United States.

A statute cannot ordinarily have extraterritorial effect.

*Galveston H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481;

*New York Central R. Co.* v. *Chisholm,* 268 U. S. 29.

Section 1 of Interstate Commerce Act expressly limits the application of its provisions with respect to transportation between United States and a foreign

country to "only in so far as such transportation * * * takes place within the United States."

C. The fact that the rate for through transportation from a point in Canada to a point in the United States is published as a joint through rate rather than as separate charges for the portions of the transportation on both sides of the international boundary does not operate to extend the Commission's jurisdiction.

Commission would not have jurisdiction of through rate if portion for Canadian part of transportation were separately published.

Form of publication of the rate can not extend the territorial jurisdiction of the Commission.

The fact that portion of joint rate covering transportation in the United States is not separately shown in tariffs does not prevent Commission from determining reasonableness thereof when facts as to such portion of the charge are presented to it.

Commission exercises similar authority in determining reasonableness of divisions under Section 15 of Interstate Commerce Act.

*New England Divisions Case*, 261 U. S. 184.

D. The Commission has itself recognized this limitation of the application of the Act and of its jurisdiction, except in recent reparation cases.

*Payment of Charges in United States Currency*, 59 I. C. C. 263.

*International Paper Co.* v. *D. & H. Co.*, 33 I. C. C. 270.

*Carey Manufacturing Co.* v. *G. T. W. Ry. Co.*, 36 I. C. C. 203.

*Carlowitz & Co.* v. *C. P. Ry. Co.*, 46 I. C. C. 290.

*Good* v. *G. N. Ry. Co.*, 48 I. C. C. 435.

*Eastern Car Co.* v. *C. G. Ry.*, 51 I. C. C. 627.

*Booth Fisheries Co.* v. *American Express Co.*, 53 I. C. C. 735.

*American Cyanamid Co.* v. *Director General,* 69 I. C. C. 337.

*Southern Acid & Sulphur Co.* v. *A. & N. M. Ry. Co.,* 74 I. C. C. 641.

*Elimination of Grand Trunk Ry. from Certain Routes,* 115 I. C. C. 609.

*Rates on Petroleum from Mississippi Valley Points to Canadian Points,* I. & S. Docket No. 2871.

The only two classes of cases in which the Commission has attempted to deal with joint through rates to or from a foreign country are, first, cases in which it has ordered American carriers to cease from joining in rates believed by it to be unreasonable (*Washington Publishers' Asso.* v. *B. & O. R. R. Co.,* 98 I. C. C. 339; *Spanish River Pulp & Paper Mills, Ltd.* v. *A. & W. Ry. Co.,* 120 I. C. C. 251), and second, cases in which it has awarded reparation to basis of lower joint through rates. (*International Nickel Co.* v. *Director General,* 66 I. C. C. 627.)

Question 1 should be answered in the negative.

II. In the absence of a finding that the charges for the portion of the transportation taking place in the United States were unjust and unreasonable for such part of the transportation, the Commission is without jurisdiction to make an order for the payment of damages to a shipper in the amount that the entire transportation charges on the basis of the joint through freight rate covering transportation both in Canada and in the United States exceeded the charges which would have been assessed on the basis of a joint through rate found by the Commission to have been reasonable for such through transportation.

A. The Interstate Commerce Commission has authority to make a reparation order only upon a de-

termination by it of a violation of the Interstate Commerce Act and only to the extent of the damages caused by such violation.

Sections 9 and 13 of Interstate Commerce Act provide for suit or complaint to Commission only for violation of the Act and for recovery of damages for which a carrier may be liable under provisions of the Act.

Section 8 of Interstate Commerce Act imposes liability on a carrier only for damages caused by violation of the provisions of the Act.

*Louisville & Nashville Railroad Co.* vs. *Sloss-Sheffield Company,* 269 U. S. 217.

*Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 186.

Commission has held itself without jurisdiction to award damages where conduct complained of did not constitute violation of the Act, although it may have afforded an action for damages in court.

*Rosser & Fitch* v. *A. C. L. R. R. Co.,* 91 I. C. C. 611.

*National Industrial Traffic League* v. *A. & R. R. R. Co.,* 61 I. C. C. 120.

*Guyton & Harrington Mule Co.* v. *L. & N. R. R. Co.,* 50 I. C. C. 546.

*Buss Co.* v. *N. Y. C. R. R. Co.,* 45 I. C. C. 161.

*Atlas Portland Cement Co.* v. *L. V. R. R. Co.,* 32 I. C. C. 487.

Commission's decisions in *International Nickel Co.* case and other reparation cases that it can award reparation to basis of reasonable joint through rate on ground that collection of unreasonable rate is a tort are unsound and in conflict with decisions just cited, since Commission has no jurisdiction to award damages for tort unless the conduct constituting the tort is a violation of the Interstate Commerce Act.

B. In the absence of a determination that the portion of such rate covering the part of the transportation service performed in the United States was unreasonable for that service, there is no determination of a violation of the Interstate Commerce Act sufficient to support an award of reparation, and an order requiring the American carrier to pay damages measured by the entire joint through rate is not an order for the payment of damages caused by such violation.

Since Section 1 of the Interstate Commerce Act limits the application of the provisions of the Act to transportation from Canada in so far as such transportation takes place within the United States, a determination that joint through rate covering the entire transportation is unreasonable is not a determination of a violation of the Act.

The amount by which entire joint through rate may be held unreasonable does not measure the amount, if any, by which the portion of the charge for the transportation in the United States was unreasonable.

C. The Commission's recent decisions in reparation cases involving rates to and from Canada can not be reconciled with its decisions cited under the previous point, and can not be supported on any theory of a distinction between the extent of the Commission's jurisdiction in awarding reparation and in prescribing rates for the future.

The difference between the functions of the Commission in awarding reparation and in prescribing rates for the future, pointed out in decision in *Baer Brothers* v. *Denver & R. G. Railroad Co.*, 233 U. S. 479, does not sustain difference in territorial extent of Commission's authority in the two classes of cases.

A finding of a violation of the Act is a prerequisite

to an order prescribing rates for the future, as well as to an order for reparation.

*Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88.

*Wichita R. R.* v. *Pub. Utilities Commission*, 260 U. S. 48.

If, as is conceded, Commission could not in advance have prescribed lower rates to be charged on shipments here involved, it is inconsistent to hold that after shipments have moved it can accomplish same result and effect a retroactive reduction of rates by a reparation order.

*New York Central R. Co.* v. *New York and Pennsylvania Co.*, 271 U. S. 124.

D. The Commission's reparation order can not be supported on any theory of joint liability, as argued by plaintiff.

Commission can require one carrier party to joint act to pay entire damages caused thereby only if joint act was violation of Interstate Commerce Act.

*Louisville & Nashville R. R. Co.* v. *Sloss-Sheffield Co.*, distinguished because there entire transportation under joint rate was within the United States and subject to Interstate Commerce Act.

Question 2 should be answered in the negative.

III. When the Interstate Commerce Commission has made an order against a United States carrier for the payment of damages based solely upon its finding that a joint through rate from a point in Canada to a point in the United States is unreasonable, a suit thereon for the recovery of such damages may not be maintained, under Section

16 of the Interstate Commerce Act, solely against the United States carrier.

This suit is brought under Section 16 of Interstate Commerce Act. This section provides for suit only for enforcement of reparation order of the Commission.

If reparation order is invalid, there is no cause of action under Section 16.

*Illinois Central R. R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, 506.

Plaintiff having elected to present its claim for damages by complaint to Commission, can not ask the court to consider the suit as an original suit for damages in court, and its case stands or falls with the validity of the Commission's order.

*Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288.

*Allen & Co.* v. *N. Y. P. & N. R. R. Co.,* 15 Fed. (2d) 532, 533.

Commission's order being invalid, a suit can not be maintained under Section 16 of the Act against the American carriers.

Question 3 should be answered in the negative.

IV. The District Court did not err in sustaining the demurrer to the petition.

The question of the validity of the Commission's reparation order was properly raised by demurrer to the petition, and since the order was invalid, the lower court was correct in sustaining the demurrer.

*Christy* v. *Elliott,* 216 Ill. 31.

*Woodruff* v. *Kellyville Coal Co.,* 182 Ill. 480.

*Shepherd* v. *City of Sullivan,* 166 Ill. 76.

*Chemung Canal Bank* v. *Lowery,* 93 U. S. 72.

## ARGUMENT.

Section 1 of the Interstate Commerce Act (41 Stat. L. 474) provides in part as follows:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation or transmission takes place within the United States.*
>
> (2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, *but only in so far as such transportation or transmission takes place within the United States.*" (Italics ours.)

All of the questions here presented may be resolved into the one question whether or not, in view of the language italicized, the jurisdiction of the Commission over transportation under a joint rate from a point in Canada to a point in the United States is confined to the portion of such joint rate which represents the charges for the transportation "in so far as it takes place within the United States" or extends to the entire rate for the service both in Canada and in the United States. Plaintiff-in-error contends that the language does not limit the Commission's jurisdiction, at least in a reparation case. We submit that the words quoted cannot be thus disregarded and that the Commission's jurisdiction does not extend to charges for transportation beyond the boundaries of this country.

## I.

**With respect to transportation from a point in Canada to a point in the United States the jurisdiction of the Interstate Commerce Commission extends only to the portion thereof within the United States, and it is without jurisdiction, on the complaint of a shipper or consignee, to determine the reasonableness of a joint through rate covering the transportation both in Canada and in the United States.**

The answer to Question 1 should be "No".

### A.

**The Commission's jurisdiction in a complaint proceeding is limited to the enforcement of the provisions of the Interstate Commerce Act.**

A complaint filed with the Commission by a shipper or a consignee can, under the terms of the Act, put in issue for the Commission's determination* only the question whether the provisions of the Interstate Commerce Act have been violated. This is clear from Section 13 of that Act (24 Stat. L. 379; 36 Stat. L. 539; 41 Stat. L. 484), which is the section providing for the filing of petitions with the Commission, the terms of which, in so far as they are pertinent, are as follows:

> "Sec. 13. (*As amended June 18, 1910, and February 28, 1920.*) (1) That any person, firm, corpo-

*By the word "determination" as used in the first question certified by the court below, we assume is meant the decision of an issue upon which the Commission is authorized to make a decision which will affect the rights of the parties and can be enforced against them by an order and a suit such as this.

> ration, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, *complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof,* may apply to said Commission by petition, which shall briefly state the facts; * * *. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to *investigate the matters complained of* in such manner and by such means as it shall deem proper." (Italics ours.)

If a shipper or consignee by a petition can complain to the Commission only of something done or omitted to be done "by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof", it necessarily follows that the Commission in a proceeding instituted by such a petition can make a determination only of such an issue. This is borne out by Sections 15 and 16, which provide what the Commission shall do in a proceeding instituted by such a petition filed with it. Section 15 (34 Stat. L., 584; 36 Stat. L., 539; 41 Stat. L., 484) provides in part as follows:

> "Sec. 15. (*As amended June 29, 1906, June 18, 1910, and February 28, 1920.*) (1) That whenever, after full hearing, upon a complaint made as provided in Section 13 of this Act, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, * * * is or will be unjust

> or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or *otherwise in violation of any of the provisions of this Act*, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, * * * and to make an order that the carrier or carriers shall *cease and desist from such violation* to the extent to which the Commission finds that the same does or will exist, * * *." (Italics ours.)

Section 16 (34 Stat. L., 584; 41 Stat. L., 491) relates to the Commission's power to make an award of damages and is therefore particularly pertinent to the present suit. Paragraph (1) of this section is as follows:

> "Sec. 16. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, and February 28, 1920.*) (1) That if, after hearing on a complaint made as provided in Section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages *under the provisions of this Act for a violation thereof*, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." (Italics ours.)

It must be clear therefore that the Commission can be called upon to make a determination, and under the statute is given the power to make a determination, in a particular case only if the question presented by the complaint is whether or not the provisions of the Interstate Commerce Act have been violated. And although the Commission may express the view that certain conduct is unlawful, this is not a "determination" by it, as that word is here used, unless the conduct is unlawful because it is in violation of the Interstate Commerce Act.

The alleged unlawful conduct of the defendants-in-error which was made the basis of the complaint to the Commission was the collection of unreasonable rates. It must be obvious that a mere finding that rates are unreasonable is not equivalent to a finding that the provisions of the Interstate Commerce Act have been violated, but that it must also appear that the rates cover transportation subject to the Interstate Commerce Act and therefore come within the provisions of that Act requiring the maintenance of reasonable rates and prohibiting the charging and collecting of unreasonable rates. *A. C. L. R. R. Co.* v. *Standard Oil Co.*, 12 Fed. (2d) 541, and cases there cited. Thus the Commission has held itself without authority to determine the reasonableness of intrastate rates or to award reparation or approve the payment of reparation for the collection of unreasonable rates on intrastate shipments on the ground that since the rates did not cover transportation subject to the Interstate Commerce Act no question of a violation of the Act existed. *Washington Dehydrated Food Co.* v. *Great Northern Ry. Co.*, 102 I. C. C. 363; *Case Coal Co.* v. *C. B. & Q. R. R. Co.*, 74 I. C. C. 391; *Cannelton Sewer Pipe Co.* v. *Director General*, 73 I. C. C. 27. It has reached a similar conclusion with respect to rates for transportation from a point in a foreign country through the United States to another point in a foreign country. *Quintall & Lynch* v. *F. E. C. Ry. Co.*, 57 I. C. C. 289.

The question here to be considered, therefore, narrows down to this: to what extent do the provisions of the Interstate Commerce Act apply to transportation from a point in Canada to a point in the United States, and, with respect to such transportation, what is prohibited by these provisions; do they prohibit the publication, charging, and collection of unreasonable through rates covering both the part of the transportation in Canada and the portion in the United States, or do they prohibit only the collection

of unreasonable charges for that portion of the transportation service performed in this country?

**B.**

**In the case of transportation from a point in Canada to a point in the United States, the provisions of the Interstate Commerce Act apply only to the portion of such transportation taking place within the United States.**

It is not the contention of the defendants-in-error that the Interstate Commerce Act has no application at all to through transportation on joint rates from a point in Canada to a point in the United States, or that the Commission is without jurisdiction to regulate in any respect whatsoever the charges for such transportation. But it is their contention that the application of the provisions of the Act and the extent of the Commission's jurisdiction thereunder are limited to that part of the transportation taking place within this country. For this reason, a considerable portion of the brief of plaintiff-in-error devoted to arguing that transportation from Canada is not exempt from the application of the provisions of the Interstate Commerce Act is wasted effort. For this reason, also, the citation by the plaintiff-in-error of this court's decisions in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357; *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U. S. 566; and *Armour & Co.* v. *United States*, 209 U. S. 56 does not advance the disposition of the issues here. For those cases are authority for nothing more than the proposition that the fact that transportation or transmission in the United States is a part of through transportation or transmission to or from a foreign country does not prevent it from being subject to the provisions of the Interstate Commerce Act—a proposition which the defendants-in-error do not here contest.

By its very nature, a joint through rate covers transportation performed by all the carriers joining in its publication, and by the terms of Question 1 as certified by the court, the joint through rate in question was a charge made for transportation both in Canada and in the United States. The earning of the rate was conduct occurring both in Canada and in the United States, and the reasonableness of the rate must be determined with reference not only to the amount of the transportation service performed within the boundaries of this country, but also in consideration of the transportation service performed by a foreign carrier in Canada.

Even if there were no express limitation in the Interstate Commerce Act of the extent of its territorial application, it is submitted that a tribunal in the United States would, in the nature of things, be without power to determine the reasonableness of such a joint through rate, and that its authority would be limited to determining whether the portion of the charge for the service in the United States was reasonable or unreasonable for that service.

An act in a foreign country can not be an act in violation of the statutes of the United States. A statute can not have extraterritorial effect. This has been held in a case involving the Interstate Commerce Act itself. *Galveston H. & S. A. Ry. Co.* v. *Wallace,* 223 U. S. 481, 490. And while in certain cases a legislature may impose liability for conduct outside its jurisdiction, a statute should not be construed to operate in this manner unless its language clearly requires. Thus in *New York Central R. Co.* v. *Chisholm,* 268 U. S. 29, 45 S. Ct. 402, the Supreme Court held that the Employers Liability Act which contained no provision as to territorial application, did not give a cause of action for the death in Canada of an employee of a railroad operating between the United States and Canada, and this in spite of the fact that the employee when killed was employed on a train from the United States which

had only a short distance before crossed the border and that both the employee and railroad were citizens of this country. If a statute which is silent as to the territorial extent of its application is held not to impose on an American carrier liability for its own conduct in Canada, how much more is this conclusion required with respect to a statute creating a statutory cause of action where the statute is, by its express terms, limited in its application to actions occurring within the United States?

Section 1 of the Interstate Commerce Act (41 Stat. L. 474) defines the application of the provisions of the Act. The pertinent portions of this section have been quoted at the beginning of this argument but are repeated here:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, * * * or from or to any place in the United States to or from a foreign country, *but only in so far as such transportation or transmission takes place within the United States.*" (Italics ours.)

This portion of Section 1 limits the application of all of the provisions of the Act, including the requirement of a later paragraph of Section 1, that rates shall be no more than just and reasonable. Accordingly it is only charges for transportation in so far as it takes place within the United States which are required to be just and reasonable and the charging of unreasonable through rates which cover transportation both in Canada and the United States is not "a thing in this Act prohibited or declared to be unlawful" within the language of the statute (Section 8).

Therefore, when the Commission is dealing with a through rate for transportation from a point in Canada to a point in the United States, if it is to make a determi-

nation of a violation of the Act, it must find that the part of such rate for the portion of the transportation service performed within the United States was unreasonable or in violation of some provision of the Interstate Commerce Act and a finding that the through rate, including compensation for the portion of the transportation service performed in Canada, was higher than the Commission considered it should be, is not a finding of a violation of the statute sufficient to afford the foundation for a reparation order.

Of all the court decisions cited in the brief of plaintiff-in-error, the only one which may appear to bear on this issue and to support the plaintiff's contention is *United States* v. *Grand Trunk Ry. Co. of Canada,* 225 Fed. 283, cited on page 21 of the brief. This was a decision of a District Court which was not reviewed by a higher court, and, so far as we can discover, has never been cited in any later case. Moreover, while at first glance it may appear to be a decision upon an issue similar to that involved here, a more careful examination of the case will show that the question decided by the court was an entirely different one. The Grand Trunk Railway had made a contract for the transportation of a show company from Detroit, Michigan, through Canada to Buffalo, New York, from Buffalo to Toronto, from Toronto to Montreal, and from Montreal to Boston. Apparently it had filed tariffs with the Interstate Commerce Commission naming rates for this transportation. As part of the arrangement, it made a contract to refund $200 per month out of the tariff charges to the show company, the refund being concealed in an advertising contract. The railroad was indicted for conspiring to give a rebate in violation of Section 6 of the Interstate Commerce Act.

The case arose prior to the amendment of the Interstate Commerce Act by the Transportation Act of 1920 and at a time when Section 1 provided that the provisions

of the Act should apply to carriers engaged in transportation "from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States" (24 Stat. L. 379) without the restriction added by the Transportation Act, 1920, that it should apply "only in so far as such transportation * * * takes place within the United States." The opinion indicates that it was the contention of the railroad that the journeys in Canada were separate journeys and not part of a through trip from a point in the United States, and that their inclusion rendered the indictment defective because, as a result, it was not confined to charging a rebate with respect to transportation either entirely within the United States or originating therein. The court held that the indictment was "not open to the inference that the transportation in question was for separate completed journeys in Canada" and that it sufficiently alleged that "the rebating was on fares for transportation from Detroit to Buffalo, and thence to Toronto, in Canada, and not, as demurrants seem to think, out of fares covering journeys originating in Canada." It is plain that such a decision is far from being a decision upon the issue here presented, namely, the extent of the application of the Interstate Commerce Act as amended by the Transportation Act, 1920, to through transportation from a point in Canada to a point in the United States. In fact, the court in its opinion in that case said (p. 285):

> "It would, of course, make a difference if the rebates were to be paid out of the rates or charges for traveling within the limits of Canada alone, or from Montreal to Boston."

Moreover, the fact that in the case cited the question was the sufficiency of an indictment charging a conspiracy to violate the terms of tariffs filed with the Interstate Com-

merce Commission, while in the present case the question is the extent of the application of the Interstate Commerce Act for the purpose of the Commission's jurisdiction in determining the reasonableness of rates duly collected in accordance with the filed tariffs and in awarding damages, renders the decision no precedent here, for the legal questions in the two sorts of cases are obviously entirely different.

## C.

**The fact that the rate for through transportation from a point in Canada to a point in the United States is published as a joint through rate rather than as separate charges for the portions of the transportation on both sides of the international boundary does not operate to extend the Commission's jurisdiction.**

It must be apparent that if the Canadian National had maintained a separate rate for its part of the transportation service from Thorold, Ontario, to the international boundary, and the American carriers had filed with the Interstate Commerce Commission tariffs providing a separate rate for their part of the through transportation from the boundary to New York, the Interstate Commerce Commission would have been without jurisdiction to consider the reasonableness of the Canadian rate for the Canadian portion of the service, and would have been likewise without jurisdiction to deal with the entire through rate made up of a combination of the separately maintained charges of the Canadian and American carriers.

The plaintiff-in-error, at pages 35 to 37 of its brief, argues that the jurisdiction of the Commission does not depend upon the form in which the rates are published. Using this same argument, it must follow that if the Commission would not have jurisdiction over the through

charge if the rates of the Canadian and American carriers were published separately, the application of the Interstate Commerce Act and the Commission's jurisdiction thereunder can not be extended beyond the international boundary to cover the part of the transportation in Canada merely because the rates are published as joint through rates. The limitation of the application of the Interstate Commerce Act by the clause "in so far as the transportation takes place within the United States", is not to be abrogated in this fashion.

It is urged, however, that the publication of a rate as a joint through rate for the through transportation from Thorold to New York without any separation in the tariff of the charges to and from the boundary, requires the Commission to deal with the joint through rate or nothing. This argument proceeds from the assumption that the Commission cannot pass upon the reasonableness of unpublished portions of rates.

In the first place it is submitted that if the assumption be correct, it nevertheless does not affect the situation. The limitation imposed by Congress upon the application of the provisions of the Act, is not set aside merely because the manner in which the rate is published may prevent the recovery of reparation in a particular case. The Commission's regulations permit the rates for transportation to and from Canada to be published as joint through rates. Perhaps this is error, but it cannot, in any event, extend the Commission's jurisdiction. The permission is doubtless for the benefit of shippers who would otherwise suffer inconvenience if required to ascertain the several factors going to make up their through rates.

Furthermore, there may be no inherent difficulty in the Commission's determining the reasonableness of an unpublished portion of a rate if the Commission is informed what it is. In the present case the Com-

mission was fully advised what portion of the joint through rate represented the part of the transportation charges received by the American carriers for their portion of the carriage within the United States. Testimony to this effect was given at the hearing before the Commission and there was therefore no actual difficulty in the way of the Commission's passing upon the reasonableness of such portion of the charge. Moreover, the Commission is expressly given similar power by Section 15 of the Interstate Commerce Act which authorizes it to pass upon the reasonableness of divisions of joint through rates. The divisions are not contained in filed tariffs. The Commission nevertheless frequently exercises this power and prescribes divisions thereafter to be maintained by certain carriers for their parts of through transportation. *New England Divisions* case, 261 U. S. 184; *Carriers' Division of Bituminous Coal Rates*, 85 I. C. C. 617.

Plaintiff-in-error cites decisions to the effect that on a complaint by a shipper the Commission is concerned only with the entire through rate paid by him and not with the divisions of that rate as between the carriers. While this is true when the entire transportation is subject to the provisions of the Act, it does not necessarily follow when a division represents the charge for the only portion of the transportation subject to the Commission's jurisdiction.

## D.

**The Commission has itself recognized this limitation of the application of the Act and of its jurisdiction, except in recent reparation cases.**

The Commission very clearly stated the territorial limitation of the application of the Interstate Commerce Act and of its own jurisdiction thereunder in a proceeding to consider the propriety of the rules of the carriers requir-

ing payment in United States currency of rates, including joint through rates, on through shipments from points in the United States to points in Canada. *Payment of Charges in United States Currency,* 59 I. C. C. 263. The Commission said at page 264:

> "Protestants object to the proposed rules, not on the general ground that the carriers are not entitled to demand pre-payment of their charges for such portion of the transportation as takes place in the United States, or that the rules are unduly prejudicial to them and unduly preferential of others, but on the ground that they would result in the carriers receiving an over-payment for that part of the transportation which takes place in Canada to the extent of the difference in the exchange values of United States and Canadian money. Our jurisdiction over transportation to or from a foreign country is limited to that part of the transportation which takes place within the United States. *Interstate Commerce Act,* section 1, paragraph (2); *International Paper Co.* v. *D. & H. Co.,* 33 I. C. C. 270. We cannot, therefore, undertake to pass upon the proposed rules in so far as they affect charges for transportation beyond the borders of the United States, but will leave their validity and propriety to be determined under the laws in force where the transportation takes place.
>
> We find that the proposed rules have been justified in so far as they affect the charges for interstate transportation wholly within the United States, and the charges or divisions accruing for that part of the transportation between the United States and a foreign country which takes place within the United States."

The Commission's decisions in the present case and in other recent cases involving its power to award reparation on shipments from Canada under joint rates appear to be directly in conflict with a long line of decisions formerly

announced by it involving both reparation and the fixing of rates for the future.

In *International Paper Company* v. *D. & H. Co.*, 33 I. C. C. 270, there was involved a complaint attacking as unreasonable joint rates for the transportation of various commodities from points in Canada to points in New York State and seeking reparation on past shipments. The defendants challenged the jurisdiction of the Commission by a motion to dismiss the complaint. In support of their complaint, counsel for complainants argued, as stated in the Commission's report (p. 272), "that this Commission has the right, the power and the duty, upon proper complaint, to determine whether or not the rates in question, named in tariffs voluntarily filed by defendants and which apply to the entire transportation service from points in Canada through ports of entry to destinations in the United States, are just and reasonable." In other words, complainants argued that the Commission had authority to do the very thing it did in the present case. The Commission there held, however, that it had no such authority and dismissed the complaint, saying, at page 272:

> "It is well settled by numerous decisions that the extent of our authority in connection with transportation to an adjacent foreign country is over that portion of the transportation within the confines of the United States. *Black Horse Tobacco Co.* v. *I. C. R. R. Co.*, 17 I. C. C. 588; *Humboldt S. S. Co.* v. *White Pass & Yukon Route*, 25 I. C. C. 136; *Fullerton Lumber & Shingle Co.* v. *B. B. & B. C. R. R. Co.*, 25 I. C. C. 376; and *Rates on Soda Ash and Other Commodities*, 28 I. C. C. 613."

Again at page 273 the Commission said:

> "We can not require the maintenance of joint rates from Canada into the United States nor control the charges that carriers in Canada may make for transportation services in that country."

That decision was cited and followed by the Commission in many cases involving similar questions. In *Carey Manufacturing Co.* v. *G. T. W. Ry. Co.*, 36 I. C. C. 203, the Commission, in referring to its report in that case, said at page 206:

> "As held in the above case, we can not prescribe joint through rates from Canada into the United States, but we can control the rates which the American lines charge from the ports of entry in the United States to destinations in the United States, whether they are joint rates or separately established rates applicable to the through transportation. Our jurisdiction attaches at the ports of entry * * *."

Complaints seeking both reparation and the prescription of rates for the future on through transportation from points in Canada to points in the United States were dismissed by the Commission for lack of jurisdiction in *Carlowitz & Co.* v. *C. P. Ry. Co.*, 46 I. C. C. 290; *Good* v. *G. N. Ry. Co.*, 48 I. C. C. 435; *Eastern Car Co.* v. *C. G. Ry.*, 51 I. C. C. 627; and *Booth Fisheries Co.* v. *American Express Co.*, 53 I. C. C. 735. Although both issues were before it, the Commission in these cases made no distinction, such as is suggested in the present case, between the limits of its power to prescribe rates for the future and its jurisdiction to award reparation, and it dismissed the complaints *in toto*. The language of the Commission's reports in these earlier cases indicates clearly that it considered that it had no jurisdiction over the through rates as such for either purpose. Thus in the *Eastern Car Co.* case the Commission, at page 629, said:

> "The Canadian Government Railways question our jurisdiction to prescribe joint rates or to award reparation, citing *International Paper Co.* v. *D. & H. Co.*, 33 I. C. C. 270. It is well settled by that and other cases that our jurisdiction over transportation to an adjacent foreign country extends only to the haul

> within the United States. We can not prescribe or require the maintenance of joint through rates to New Glasgow or Trenton, and it is not shown that the charges accruing to the United States carriers under the joint rates legally applicable to Montreal for that portion of the transportation within the United States were unreasonable."

and in the *Booth Fisheries Co.* case it said at page 736:

> "In their answers and at the hearing the defendants questioned our authority to award the reparation sought. We have held that our jurisdiction over through rates from points in Canada to points in the United States is limited to the portion of such transportation performed by the carriers from the port of entry. *International Paper Co.* v. *D. & H. Co.*, 33 I. C. C. 270, and *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I. C. C. 203. No evidence was submitted by complainant to show that the portion of the rate which accrued to the American lines was unreasonable, unjustly discriminatory, or unduly prejudicial."

The Commission in recent cases has consistently adhered to the views expressed in these cases with respect to its power to prescribe for the future joint through rates from points in Canada to points in the United States, holding itself to be without jurisdiction to do this. *American Cyanamid Co.* v. *Director General*, 69 I. C. C. 337; *Southern Acid & Sulphur Co.* v. *A. & N. M. Ry. Co.*, 74 I. C. C. 641.

This view was emphatically reiterated by the Commission in a very recent case, *Elimination of Grand Trunk Ry. from Certain Routes*, 115 I. C. C. 609. In this case it appeared that carriers engaged in transportation from Duluth, Minnesota, and other points, through Canada to destinations in New England, had filed tariffs the effect of which was to eliminate as an intermediate carrier the line of the Grand Trunk Railway from Port Huron, Michigan,

through Canada to the Niagara frontier. Upon the protest of representatives of shippers who sought to have the carriers required to continue the joint through rates via the line of the Grand Trunk, the Commission entered upon an investigation. The Commission, while concluding that the reasons given by the carriers for seeking to cancel the rates via the Grand Trunk, namely, the inability of the various railroads to agree on their respective divisions of the through rates, would not be considered under the Interstate Commerce Act a sufficient justification for their action, nevertheless held that it was without jurisdiction to require the carriers to continue the rates since this would amount to prescribing joint through rates covering transportation in Canada. In its conclusion, the Commission said at page 611:

> "But in *New England Divisions, supra,* we observed that our jurisdiction with respect to the divisions accruing to the New England carriers out of joint rates with their Canadian connections obtains only in so far as the transportation takes place in the United States. Thus, although the joint rates are now in effect over the route sought to be eliminated and the use of that route is of material importance to the shippers, the principle referred to as ordinarily controlling a situation of this kind has no application here. We have no authority either to require the establishment of joint rates over this route or to prevent their cancellation."

In another recent decision in *Rates on Petroleum from Mississippi Valley Points to Canadian Points,* I. & S. No. 2871, the Commission again held itself without authority to prevent Canadian lines from withdrawing their participation in the publication of joint through rates, saying:

> "The provisions of the Interstate Commerce Act apply to common carriers engaged in transportation of property by railroad in so far as such transporta-

tion takes place within the United States. We are therefore without authority to prevent the Canadian lines from withdrawing their participation in the joint rates, or to prevent cancellation of the joint rates upon such withdrawal. *Elimination of Grand Trunk Railway from Certain Routes,* 115 I. C. C. 609. The lawfulness of the rates or charges for that part of the transportation which takes place in the United States has not been put in issue or dealt with on the record."

Thus the Commission has clearly recognized that the application of the provisions of the Interstate Commerce Act to transportation from Canada is limited to the portion of the transportation taking place within the United States and that it is without jurisdiction either to order the establishment of joint through rates for the future, such rates covering transportation both in Canada and in the United States, or to prevent the cancellation of such rates if the carrier performing the Canadian portion of the transportation desires to withdraw therefrom, even though this inevitably would result in increasing the through charges to the basis of the local rates of the Canadian and the American carriers.

In contrast with the foregoing cases, there remain two classes of cases in which the Commission has assumed to make a determination of the reasonableness of joint through rates from a point in Canada to a point in the United States. The first consists of the cases in which the Commission has prohibited the American carriers from joining with the Canadian carriers in the publication of joint through rates believed by it to be unreasonable, and the second is made up of the recent cases in which the Commission has assumed to find that joint through rates from points in Canada to points in the United States were unreasonable in the past, and to award reparation.

The first class of these cases is typified by the recent

decisions of the Commission in *Spanish River Pulp & Paper Mills, Ltd.* v. *A. & W. Ry. Co.*, Docket No. 15916, 120 I. C. C. 251, decided January 3, 1927, and in *Washington Publishers' Asso.* v. *B. & O. R. R. Co.*, 98 I. C. C. 339. In the *Spanish River* case the Commission found that certain joint through rates on newsprint paper from points in Canada to destinations in Wisconsin, Minnesota, Illinois, Missouri, and Iowa were unreasonable to the extent that they exceeded certain rates specified in the Commission's report, and the Commission ordered the American carriers, "according as they participate in the transportation within the United States", to cease from participating in publishing, demanding, or collecting higher joint through rates than those determined by the Commission to be reasonable. The reasoning upon which the majority of the Commission reached its conclusion is thus stated in the opinion of Commissioner Lewis:

> "We have exercised jurisdiction to award, against American lines as participating tort feasors, reparation for damages which resulted from the imposition of excessive international joint rates. *International Nickel Co.* v. *Director General*, 66 I. C. C. 627, in which the question of our jurisdiction was fully reviewed, was within the latter class. If we may require American lines to pay reparation under international joint rates, how much more rational is the assumption that we may require them to refrain from participating in and applying rates which will render them subject to such judgments."

The decision in the *International Nickel Co.* case will be more fully discussed under the next point, dealing primarily with the Commission's power to award reparation. It should be observed, however, that in the *Spanish River* case the Commission has gotten itself into a strange inconsistency in its reliance upon the *International Nickel* case, for in the latter it held that it had no power to order

the maintenance of certain joint rates for the future but that there was a difference between its action in rates for the future and in awarding reparation and that it had the power to award reparation to the basis of through rates believed by it to be reasonable. In the *Spanish River* case, Commissioner Lewis relies upon the Commission's determination that it can award reparation as authority for his argument that it can therefore prescribe rates for the future. Commissioners Aitchison, Esch, Hall and Woodlock dissented from the decision of the majority in the *Spanish River* case upon the ground that the Commission had no power to deal with the joint through rates except with the portion thereof within the United States, and Commissioner Myer, while concurring in the majority report, stated that he did so solely for the purpose of facilitating a judicial determination of the legal questions involved. The objection to the Commission's jurisdiction cannot be more forcefully stated than in the following language from the dissenting opinion of Commissioner Aitchison:

> "In the determination of this proceeding we are to bear in mind that the commission is a body of limited powers which derives its only authority from an Act of Congress in terms applicable to transportation 'from a foreign country, but only in so far as such transportation * * * takes place within the United States.' What is proposed by the majority is not restricted in its practical effect to a regulation of transportation *only* in so far as it takes place within the United States, but reaches across a border of the nation into the realm of another power and undertakes by compulsion of the carriers within the United States to require other carriers not located within the limits of this sovereignty to adjust their bases of rates as between producing communities in Canada to conform to standards imposed by the interstate commerce act. The result is to extend the interstate commerce act,

both unconstitutionally and in violation of the express limitation of the statute itself, to cover transportation not embraced within the only law which we have any right to enforce, and to give an extraterritorial effect which comity alone would require us to avoid, even if the positive limitations upon our powers did not exist. This situation is analogous to that presented in *Louisville & N. R. Co.* v. *Eubank,* 184 U. S. 27, where an attempt was made to regulate the State rates by the standard of more distant interstate rates over the same line. Here, as there, the direct effect of the attempt is to regulate the rates at the longer distances, and the vice of the decision lies in the ostensible regulation of the rates between points wholly within the United States by the standard of rates which obtain from points outside those in the United States, with the necessary effect of regulating rates which obviously are no concern of this Government.

For good cause I took no part in the consideration and determination of the *International Nickel Company case, supra,* and therefore express no view as to the correctness of the decision of the commission therein. But to the extent that the doctrine of the case as applied to the present controversy virtually results in an assertion of extraterritorial jurisdiction denied in terms, I dissent.

We are dealing with joint rates from points in Canada to points in the United States, *i. e.,* indivisible entities lying partly south and partly north of the international border. We undertake to pass judgment on these rates, finding that the joint rates from Espanola, Ont., to points in the United States will be unreasonable 'in so far as the transportation takes place within the United States' to the extent that they exceed by more than 4 cents rates to the same points from Sault Ste. Marie. How do we know this? The Canadian lines concerned in the case offered no evidence. What have we before us concerning conditions of the transportation in Canada? Nothing but the respective mileages from the producing points in Can-

ada to the international boundary. Yet we undertake to say what shall be a reasonable differential, Espanola over Sault Ste. Marie, on traffic moving wholly in Canada—for this is the net result of our finding, no matter how that finding may be expressed. I am unable to see how we can form judgments on matters which are not of record and over which we have no jurisdiction."

It will be observed that even in these cases the Commission has not assumed to make an order requiring a readjustment of the through rates as such to rates found reasonable by it.

The second class of cases in which the Commission has assumed jurisdiction to determine the reasonableness of joint through rates from points in Canada is the only one in which the Commission has done this, namely, cases like that here involved, in which it has awarded reparation on past shipments. These will be discussed more fully under the next point. The reasoning of the Commission in these cases appears to be not that the Interstate Commerce Act applies to the entire transportation to and from a point in Canada, but that the Commission in awarding damages is exercising a judicial rather than an administrative function, the scope of which for some reason is not confined to the territorial limits of the application of the Interstate Commerce Act. In the next point we will endeavor to demonstrate that there is no such distinction between the functions of the Commission in awarding reparation and in prescribing rates for the future as to result in this difference in the territorial extent of its jurisdiction in the two classes of cases.

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For the foregoing reasons it is submitted that the first Question certified by the court below should be answered in the negative.

## II.

**In the absence of a finding that the charges for the portion of the transportation taking place in the United States were unjust and unreasonable for such part of the transportation, the Commission is without jurisdiction to make an order for the payment of damages to a shipper in the amount that the entire transportation charges on the basis of the joint through freight rate covering transportation both in Canada and in the United States exceeded the charges which would have been assessed on the basis of a joint through rate found by the Commission to have been reasonable for such through transportation.**

The answer to Question 2 should be "No".

### A.

**The Interstate Commerce Commission has authority to make a reparation order only upon a determination by it of a violation of the Interstate Commerce Act and only to the extent of the damages caused by such violation.**

An examination of the Interstate Commerce Act will disclose that all of its provisions support the proposition that the Commission may make an order for the payment of damages only when it has found that the Interstate Commerce Act itself has been violated and only to the extent of the damages caused by such violation.

Section 9 of the Interstate Commerce Act (24 Stat. L. 379), authorizing the filing with the Commission of complaints claiming damages, is in part as follows:

"Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

From this section it will be seen that a complaint seeking damages may be made to the Commission only by a person or persons "claiming to be damaged by any common carrier subject to the provisions of the Act", and that such an action may be only "for the recovery of the *damages for which such common carrier may be liable under the provisions of this Act.*"

This is a clear limitation of the character of complaints which the Commission may entertain. The limitation is further emphasized by Section 13 (24 Stat. L. 379; 36 Stat. L. 539; 41 Stat. L. 484), which provides for the filing of complaints with the Commission. Paragraph (1) of this section is as follows:

"Sec. 13. (*As amended June 18, 1910, and February 28, 1920.*) (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts;

whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

It will be observed that this authorizes a complaint to be made to the Commission only "of anything done or omitted to be done by *any common carrier subject to the provisions of this Act in contravention of the provisions thereof.*"

When a complaint has been made to it, the power of the Commission to make an award of damages is derived from Section 16, previously quoted, the first paragraph of which is as follows:

"Sec. 16. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, and February 28, 1920.*) (1) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

This section alone is sufficient to require the conclusion that the Commission can award damages only for a violation of the provisions of the Act. But if there were any doubt upon the point, it is set at rest by Section 8 (24 Stat. L. 379), which is the section rendering a carrier liable for damages. This section is as follows:

> "Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of *damages sustained in consequence of any such violation of the provisions of this Act,* together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Italics ours.)

In *Louisville & Nashville Railroad Co.* v. *Sloss-Sheffield Company,* 269 U. S. 217, 46 S. Ct. 73, which, like this, was a suit to enforce a reparation order of the Commission, this court, in discussing the nature of a carrier's liability for damages under the Interstate Commerce Act, said:

> "The cause of action sued on is of statutory origin. It rests primarily upon section 8 (Comp. St. 8572) which declares that if 'any common carrier * * * shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful * * * such common carrier shall be liable * * * for the full amount of damages sustained in consequence of any such violation of the provisions of this act. * * *.'"

In *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 186, this court had occasion to consider the character of claims for which Section 8 of the Interstate Commerce Act created a cause of action. This was an action to recover the value of goods received by the defendant carrier for transportation and lost while in the care of a connecting carrier en route to destination. The question under Section 8 was not as to the power of the Commission to make a reparation order, since the suit was an original one in court, but was as to whether the plaintiff was entitled to recover counsel fees. The claim for counsel fees, however, was based upon the language of Section 8, which provides for the inclusion of counsel fees in addition to damages in an award made against a carrier under its terms, and therefore the court was called upon to determine the character of the claims covered by Section 8 for which that section imposed liability on carriers. It was held that the plaintiff was not entitled to recover counsel fees for the reason that the claim for the loss of goods did not come within the terms of Section 8, Mr. Justice Lurton saying (208):

> "But that section applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery 'of damages sustained in consequence of any such violation of this act,' etc. The cause of action in the present case is not for damages resulting from 'any violation of the provisions of this act.' "

In short, the Commission is not clothed with power to make an award of damages for every sort of wrong of which a carrier may have been guilty, even though the carrier's conduct might support an action for damages before some other tribunal, but it may make a valid reparation order only if it has found that the carrier's conduct

constituted a violation of the provisions of the Interstate Commerce Act itself.

The Commission in a long line of cases has recognized this limitation upon its jurisdiction, holding itself to be without authority to award reparation in any case where the conduct complained of did not constitute a violation of the Interstate Commerce Act, although it may have afforded a cause of action for damages in court. *Rosser & Fitch* v. *A. C. L. R. R. Co.*, 91 I. C. C. 611; *National Industrial Traffic League* v. *A. & R. R. R. Co.*, 61 I. C. C. 120; *Guyton & Harrington Mule Co.* v. *L. & N. R. R. Co.*, 50 I. C. C. 546, 551; *Buss Co.* v. *N. Y. C. R. R. Co.*, 45 I. C. C. 161; *Atlas Portland Cement Co.* v. *L. V. R. R. Co.*, 32 I. C. C. 487.

This point seems to us self-evident from the language of the statute, but it has been argued at this length because the Commission, in making the order here sued upon and those in other recent reparation cases, seemed to consider that its power to do so was derived from some general authority to award damages for torts regardless of whether the Commission had jurisdiction over the transportation involved in other respects. This is indicated by the following language from the Commission's report in the case of *International Nickel Co.* v. *Director General*, 66 I. C. C. 627, which is the Commission's principal decision upon this point and is cited by it in its report in the present case, as outlining the reason for its conclusion that it had jurisdiction to enter the order in question (R., p. 20).

> "The charging of an unreasonable rate is a tort, *Southern Pac. Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534, and the parties to such a rate are jointly and severally liable for any resulting damage. *Nicola, Stone & Myers Co.* v. *L. & N. R. R. Co.*, 14 I. C. C. 199; *Atlantic & Pacific Railroad* v. *Laird*, 164 U. S. 393, 399."

The plaintiff-in-error appears to rely upon a similar argument in support of its case, for at page 72 of its brief it says:

> "The fact is that a carrier which exacts an unreasonable rate is guilty of a tort, that tort being a violation of Section 1 of the Interstate Commerce Act, and this cause, being a proceeding to recover reparation awarded by the Commission, is a tort action."

As has already been pointed out, the mere fact that a rate may in the opinion of the Commission be unreasonable or that its collection is a tort does not render its collection a violation of Section 1 of the Interstate Commerce Act. And while Section 1 of the Interstate Commerce Act requires the maintenance of reasonable rates and prohibits the collection of unreasonable rates, this requirement and prohibition relate only to rates for transportation to which the provisions of the Interstate Commerce Act apply. Thus the collection of an unreasonable rate for intrastate transportation is not a violation of the Interstate Commerce Act, and even though the collection of such a rate might be a tort, the Interstate Commerce Commission would not have jurisdiction to award reparation to a shipper damaged thereby. Therefore, assuming for the sake of argument that an unreasonable joint through rate has been collected here, it does not follow either that the Commission has jurisdiction to award reparation or that a violation of section 1 of the Interstate Commerce Act has been committed unless the rate was for transportation to which the terms of section 1 were applicable.

## B.

**In the absence of a determination that the portion of such rate covering the part of the transportation service performed in the United States was unreasonable for that service, there is no determination of a violation of the Interstate Commerce Act sufficient to support an award of reparation, and an order requiring the American carrier to pay damages measured by the entire joint through rate is not an order for the payment of damages caused by such violation.**

The argument under Point I of this brief and the reasons set forth under the previous heading, should demonstrate that in the case of transportation from a point in Canada to a point in the United States, where the alleged unlawful conduct is the collection of unreasonable charges, a violation of the Interstate Commerce Act can occur only if the portion of the charges for the part of the transportation service taking place within the United States is unreasonable for that service. The first paragraph of Section 1 prescribes the limitations of the application of the Act, and in the case of transportation from a point in Canada to a point in the United States, definitely provides that such application is limited to the transportation in so far as it takes place within the United States. This is a limitation upon all of the provisions of the Act. In the case of that portion of Section 1 requiring the maintenance of reasonable rates and prohibiting the collection of unreasonable charges, it means that with respect to transportation from Canada the Act prohibits the collection of unreasonable charges only for that part of the transportation service taking place within the United States.

It follows that a purported determination that the through charge is unreasonable is not a determination that the Interstate Commerce Act has been violated and

in the absence of a finding that the portion of the charge covering that part of the transportation service taking place in the United States was unreasonable there is no finding of a violation of the Act, which is a prerequisite to an order for the payment of damages.

It follows also that an order requiring the payment by way of damages of the difference between the joint through rate actually collected and the joint through rate found by the Commission to be reasonable is not an order for the payment of damages caused by a violation of the Interstate Commerce Act but is an order affecting charges for transportation in Canada as well as in the United States. Moreover, the amount by which the through rate actually charged exceeded the through rate believed to be reasonable may be entirely different from the amount, if any, by which the portion of the charge for the service in the United States exceeded a reasonable charge for that part of the through service.

This is amply demonstrated in the case at bar. The through rate collected on a large part of the shipments involved was 33.5 cents. The through rate found reasonable by the Commission was 29.5 cents. On these shipments the Commission's reparation order requires the refund of 4 cents. Under the rate of 33.5 cents, the portion of the charge accruing to the American carriers for that part of the service performed by them within the United States was 25.1 cents, the Canadian carrier receiving 8.4 cents. The freight was hauled by the American carriers distances ranging from 414 to 447 miles. For its charge of 8.4 cents the Canadian National hauled the freight only from 12 to 30 miles. The defendants compared their charge of 25.1 cents for their hauls ranging from 414 to 447 miles with numerous rates maintained for transporting newsprint paper to New York City for similar distances. All of these comparisons tend to show that the division of 25.1 cents

was not unreasonable for the transportation service performed. For example, the freight rate for shipments of newsprint paper originating at Niagara Falls, New York, consigned to New York City was 26.5 cents, and the attention of the Commission was directed to the fact that in *Express Class Rates Between United States and Canada,* 68 I. C. C. 20, it had held that the divisions of through rates received by American carriers for the United States portion of through transportation to and from Canada were not unreasonable if they did not exceed the charges of the American carriers under their local rates to and from points located on the international boundary. The defendants-in-error therefore believe that their charge was not an unreasonable charge for their part of the transportation service and that if the through rate was unreasonable, it was because the Canadian National's charge of 8.4 cents was excessive for its haul of 12 miles. If the defendants' contention was correct, the difference of 4 cents per hundred pounds between the through rate collected and that believed reasonable by the Commission was not caused by a violation of the Interstate Commerce Act. And even if the defendants-in-error were not correct in their contention as to the reasonableness of their part of the through charge, nevertheless it does not follow that their division of 25.1 cents exceeded by 4 cents a reasonable charge for their part of the through transportation service. Certainly the defendants-in-error were entitled to have a determination made upon this issue, and in the absence of such a determination it can not be held that the amount by which the through charge exceeded a through rate believed to be reasonable represented the amount of damages caused by a violation of the Act, in other words, by the collection of an unreasonable charge for that part of the through transportation taking place within the United States.

C.

**The Commission's recent decisions in reparation cases involving rates to and from Canada can not be reconciled with its decisions cited under the previous point, and can not be supported on any theory of a distinction between the extent of the Commission's jurisdiction in awarding reparation and in prescribing rates for the future.**

In spite of all of the decisions cited under the previous point at pages 27 to 37 of this brief, in which the Commission dismissed for lack of jurisdiction complaints praying for reparation as well as complaints seeking reductions in rates for the future, and in spite of its recent decisions with respect to its lack of authority to prescribe joint rates for the future covering transportation in Canada and the United States, the Commission in *International Nickel Co.* v. *Director General, supra,* announced that it had power to find through rates from points in Canada to points in the United States unreasonable in the past and to award reparation in the amount that such rates for the through transportation service exceeded rates believed by the Commission to be proper therefor. The decision of the Commission in the *International Nickel Co.* case was cited by it as its authority for its determination and order in the case with which we are here concerned, and has been followed by it in a considerable number of other cases involving claims for reparation. *U. S. Graphite Co.* v. *Director General,* 88 I. C. C. 157; *Aunt Jemima Mills Co.* v. *Director General,* 83 I. C. C. 549; *Keith Co.* v. *Director General,* 83 I. C. C. 167; *Arnhold Bros.* v. *Director General,* 69 I. C. C. 685.

We submit that these later decisions cannot be reconciled with the Commission's decisions previously cited. It is perhaps significant that in its opinions in these last mentioned cases the Commission made little or no reference to

the earlier cases and it made no effort either to harmonize its later decisions with its decisions in the earlier cases or to draw a distinction between them.

There has been no amendment of the statute since the earlier cases which justifies the difference in conclusions. This the Commission recognized in its decision in the *International Nickel Co.* case, which is the harder to understand since in its report in that case the Commission itself said:

> "It is said that the amendments made by the transportation act, 1920, in section 1 of the act to regulate commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry our territorial jurisdiction up to the international boundary line, at which that of Congress itself halts. Our territorial jurisdiction as to foreign commerce is thus co-extensive with that of the federal government. No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the Interstate Commerce Act has full effect just as the federal control act had effect when these shipments moved."

The conflict between the Commission's decisions is apparent and we submit that it is the decisions in the present case, the *International Nickel Co.* case and the other reparation cases following it that are in error.

Certainly the expressions of dissent by members of the Commission in the Commission's decision in the *International Nickel Co.* case, and the criticisms of that case found in later reports, greatly weaken the force of that case as an authority in support of the Commission's decision here involved and other similar reparation cases. In the *International Nickel Co.* case Commissioners Daniels and Potter dissented from the decision of the majority and Commissioner Aitchison did not participate. In the

*Spanish River Pulp & Paper Mills* case (*supra*), as has already been pointed out, Commissioner Myer stated that he had concurred in the majority report in the *International Nickel Co.* case solely for the purpose of facilitating a judicial determination of the questions involved. Commission Aitchison voiced the dissenting opinion which has already been quoted at pages 35 to 37 of this brief, and Chairman Esch and Commissioners Hall and Woodlock joined in this dissent. Clearly there is serious doubt in the minds of the members of the Commission as to their jurisdiction over joint through rates covering transportation in Canada.

The plaintiff seeks to sustain the action of the Commission by urging that there is a difference between the functions exercised by the Commission in awarding damages and those exercised by it in prescribing rates for the future (brief, pages 19 to 24), and cites the decision of this Court in *Baer Brothers* v. *Denver & R. G. Railroad Co.*, 233 U. S. 479. Granted that the functions are different, this does not explain away the language of the portions of the statute relating particularly to the Commission's power to award damages only for a violation of the Act. And certainly there is nothing in the opinion of the Supreme Court in the *Baer Brothers* case to indicate that the fact that the Commission in awarding damages is exercising different functions from those which are brought into play when it fixes rates for the future gives it any more power to award damages without having previously made a finding that the provisions of the Interstate Commerce Act have been violated than it has to order a carrier to change its rates for the future without a finding that its existing rates violate the statute. And it is well settled that it cannot do the latter. *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88; *Wichita R. R.* v. *Pub. Utilities Commission*, 260 U. S. 48.

Moreover, such distinction as there may be between the

characters of the functions exercised by the Commission in prescribing rates for the future and in ordering the payment of reparation does not justify a conclusion that there is a difference between the traffic subject to, or the territorial extent of, the regulatory authority of the Commission in the two classes of cases, nor does the *Baer Brothers* case so hold.

This can be readily demonstrated. Suppose that in 1921 the Commission had been called upon by the plaintiff by complaint filed with it to determine the reasonableness of the joint through rate from Thorold to New York as applied to shipments to be transported in 1921, 1922, 1923 and 1924, and had been asked to prescribe a lower joint through rate for such future shipments than the rate then in effect. Consistently with the cases which have been cited, and strictly in accordance with the law, as plaintiff-in-error concedes (brief, page 20: "* * * the lack of jurisdiction in such cases is obvious") the Commission would have declined to act, holding itself to be without power to prescribe joint through rates for the future covering transportation in Canada. However, the substantial effect of the Commission's reparation order here sued upon is to accomplish the same result retroactively by requiring, through the payment of reparation, a readjustment of the freight charges collected on shipments moving in the years 1921, 1922, 1923 and 1924 to the basis of lower charges than were then actually in effect and collected. The reparation order must therefore be equally beyond the Commission's power. This reasoning finds support in the decision of this court in *New York Central Railroad Co.* v. *New York and Pennsylvania Co.*, 271 U. S. 124, 46 S. Ct. 447, decided April 26, 1926, where it held that in spite of the distinction between the functions exercised by a Commission in awarding damages and in prescribing rates for the future, nevertheless when a Commission was without power to reduce rates (in that case because of a statutory prohibition

against reductions in rates during a certain period), it was not only without power to prescribe lower rates for future shipments moving during that period but was also without power thereafter to award reparation on past shipments which had moved during the period in question. If the Commission in 1921 could not have required the carriers to establish joint through rates for future transportation from Thorold to New York lower than were in effect, how can it later, after these shipments have been transported, by a reparation order, accomplish the same result and require the carriers to make a readjustment of the charges collected on them to the basis of such lower rates?

## D.

**The Commission's reparation order can not be supported on any theory of joint liability, as argued by plaintiff.**

At pages 32 to 34 of its brief, the plaintiff-in-error endeavors to escape the fact of the Commission's admitted lack of jurisdiction over the Canadian carrier by advancing the argument that since the rates charged were published jointly by the defendants-in-error and the Canadian National, the Commission's reparation order can be enforced against the defendants, although the Canadian National may not be made amenable thereto, the theory being that when parties embark upon a joint enterprise any one of them may be held liable in damages for the full amount of the injury resulting therefrom.

The fallacy of the argument as applied to the present case is obvious, for it begs the question involved. When parties embark upon a joint enterprise, no joint and several liability for damages follows unless their joint act is unlawful. And since, as we hope the foregoing argument has demonstrated, the Commission can make a reparation

order only for the payment of damages resulting from a violation of the Act, the theory of joint and several liability empowers it to make an order against one of several parties to a joint act only if the joint enterprise constitutes a violation of the Interstate Commerce Act. It is not the joint character of the conduct which creates liability, but the fact that the joint conduct violates the statute.

In the present case, the joint conduct was the publication and collection of the joint through rates, covering transportation both in Canada and in the United States. Such joint conduct was not a violation of the Interstate Commerce Act since that statute prohibits the charging of unreasonable rates only in so far as the transportation takes place within the United States.

The plaintiff-in-error in support of its contention cites the case of *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Co., supra,* but the distinction between the facts in that case and those in the case at bar is readily apparent. There the entire through transportation was within the United States and was admittedly subject to the provisions of the Interstate Commerce Act. Therefore, the Commission's reparation order could have been directed against any one of the carriers participating in the transportation, and the case can be said to hold nothing more than that under such facts it was no defense to the carrier to whom the reparation order was directed that the order ran solely against it and did not run likewise against the other carriers participating in the transportation who were equally subject to the statute. In the case at bar the plaintiff admits that the Canadian National was not equally subject to the Act. (Brief, pp. 20, 32.)

The theory of joint liability from the publishing of joint through rates indicated in the Supreme Court's decision in the *Sloss-Sheffield* case supports the contention of defendants rather than otherwise. For as we understand,

it is of the essence of a joint act that if it is lawful for one of the parties engaging therein it is lawful for all, and it is unlawful for one only if it is unlawful for the others. In so far as the Canadian National Railway is concerned, the joint act of publishing and collecting the joint through rates was not and could not be a violation by it of the provisions of the Interstate Commerce Act since that statute had no application to the transportation performed by it in Canada. It follows that the joint conduct was not a violation of the Interstate Commerce Act on the part of the defendants. The jurisdiction of the Commission extends only to the separate conduct of the carriers within the United States. The Commission having made no finding with respect to this and not having confined its order thereto, its order is invalid.

In some cases where the Commission has assumed jurisdiction to award reparation with respect to through rates on international transportation because the rates were published as joint rates, it has apparently been led to do so because there was no evidence before it as to the portions of such rates covering the transportation within the United States. Such was the fact in *Black Horse Tobacco Co.* v. *I. C. R. R. Co.*, 17 I. C. C. 588, cited and quoted from at page 22 of plaintiff-in-error's brief. Whether or not there is legal authority for the Commission's action in cases where such a situation exists, there is no such situation here, for the evidence before the Commission showed specifically the portions of the through rates representing the charges of the American carriers for the part of the transportation taking place in the United States and contained evidence upon which the Commission could have determined whether or not such charges were reasonable. This was certainly sufficient to enable the Commission to confine its action within the limits of its jurisdiction.

Moreover, as has already been pointed out at pages

25 to 27 of this brief, the argument of plaintiff-in-error, that the fact that the American carriers joined with the Canadian National in publishing the rates as joint rates gives the Commission power to make a reparation order against defendants-in-error with respect to the entire through rates is in direct conflict with the contention to which plaintiff-in-error devotes pages 35 to 37 of its brief that "the jurisdiction of the Interstate Commerce Commission does not depend on the form of rate publication."

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For the foregoing reasons it is submitted that Question 2 certified by the court below should be answered in the negative.

## III.

**When the Interstate Commerce Commission has made an order against a United States carrier for the payment of damages based solely upon its finding that a joint through rate from a point in Canada to a point in the United States is unreasonable, a suit thereon for the recovery of such damages may not be maintained, under Section 16 of the Interstate Commerce Act, solely against the United States carrier.**

The answer to Question 3 should be "No".

Section 16 of the Interstate Commerce Act (34 Stat. L. 584; 36 Stat. L. 539; 41 Stat. L. 491), pursuant to which this suit was brought in the court below, is, so far as is pertinent to the present inquiry, as follows:

"Sec. 16. (*Amended March 2, 1889, June 29, 1906, June 18, 1910, and February 28, 1920.*) (1) That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

From the foregoing language it is apparent that the only sort of suit authorized by this section of the statute is one to enforce a reparation order of the Commission

and that a suit lies thereunder only if such an order has been made. This must mean a valid reparation order, for an invalid order and one beyond the power of the Commission is no order at all. *Illinois Central R. R. Co.* v. *Public Utilities Commission,* 245 U. S. 493, 506.

Section 9 of the Interstate Commerce Act (24 Stat. L. 379) precludes any consideration of this suit as an original one in the court below apart from the action of the Commission. The pertinent portion of this section provides:

> "Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The plaintiff elected to proceed by complaint to the Commission, and having done so, it may not now ask this court to consider the merits of its claim, regardless of the validity or the invalidity of the Commission's order, and must succeed or fail with that order. *Louisville & Nashville R. R. Co.* v. *Ohio Valley Tie Co.,* 242 U. S. 288.

As the Circuit Court of Appeals for the Fourth Circuit said recently in the case of *Allen & Co.* v. *N. Y. P. & N. R. R. Co.,* 15 Fed. 2nd, 532, 533, (certiorari denied, 47 Sup. Ct. 459) where a somewhat similar question was presented, the claim being one under the Interstate Commerce Act:

> "In the cases at bar, the shippers must recover, if

> at all, upon the rights given them by certain acts of Congress and proceedings of the Interstate Commerce Commission authorized thereby. It does not help the shippers that, had there been no such acts or proceedings, they could at common law have recovered from a common carrier any sums which had been unlawfully extorted from them, for in the cases which they now present the question whether there was any extortion, and, if so how much, depends altogether upon the construction of the federally prescribed tariffs."

Therefore, since the Commission's reparation order is not valid, not being based upon a finding of a violation of the Interstate Commerce Act, and not being confined to damages for such violation, the plaintiff's petition fails to state a cause of action, and it matters not whether the defendants' conduct would or would not have afforded a cause of action at common law or under some other statute, and it is immaterial whether or not the plaintiff could have maintained an original suit in the court below or elsewhere. And this is true whether the suit be brought against all of the carriers engaged in the transportation or solely against the American carriers.

We accordingly submit that Question 3 should be answered in the negative.

## IV.

**The District Court did not err in sustaining the demurrer to the petition.**

The answer to Question 4 should be "No".

If the contentions under the previous points are correct, it follows that the petition setting forth, as it does,

only the invalid reparation order of the Commission, and being based thereon, fails to state a cause of action, and under the usual practice, should be subject to attack upon demurrer. This is apparently the proper practice in the United States District Court for the Northern District of Illinois, where this suit was instituted. No decision exactly similar has been found in which the practice in the Illinois courts has been passed upon, but since whether or not the petition states a cause of action depends upon the validity of the reparation order, the situation presented is analogous to that arising in a case where it is desired to challenge the validity of a statute upon which a suit is predicated. It has been held by the highest courts of Illinois that this should be done by demurrer to a complaint brought under the statute and that the demurrer should be sustained if the statute is held to be invalid. *Christy* v. *Elliott,* 216 Ill. 31; *Woodruff* v. *Kellyville Coal Co.,* 182 Ill., 480; *Shepherd* v. *City of Sullivan,* 166 Ill. 76.

This being a suit at law, State practice determines the practice here. The validity of the reparation order was, therefore, properly challenged by demurrer to the petition, and the judgment of the court below sustaining the demurrer should be affirmed if this court concludes that the reparation order was invalid. *Chemung Canal Bank* v. *Lowery,* 93 U. S. 72.

It follows that Question 4 should be answered in the negative.

## Conclusion.

The ultimate question to be determined is whether the plaintiff-in-error in its suit is entitled to recover the amount of reparation ordered by the Interstate Commerce Commission. It is submitted that it may not, for the reasons which have already been set forth, which may be summarized as follows:

1st—The Commission may make an order for the payment of reparation only upon a determination by it that there has been a violation of the Interstate Commerce Act which has caused damage to the plaintiff, and in the amount of the damage so caused by such violation.

2nd—With respect to transportation from a point in Canada to a point in the United States, the provisions of the Interstate Commerce Act apply only to the portion of such transportation taking place within the United States, and therefore the requirement of the Act that rates shall be just and reasonable is limited to the portion of the through rate representing the charge for the portion of the transportation within the boundaries of this country.

3rd—For this reason, a determination that the through rate is or was unreasonable is not a determination that the provisions of the Interstate Commerce Act have been violated.

4th—For the same reason, in the absence of a determination by the Commission of the unreasonableness of the portion of the joint through rate from a point in Canada to a point in the United States representing the part of the through charge covering the portion of the transportation service taking place in this country, there is no determination by the Commission of a violation of the Interstate Commerce Act to support a reparation order by it.

5th—A so-called reparation order which purports to direct a refund of the entire amount by which the joint through rates were found by the Commission to be unreasonable is not limited to requiring the payment of damages for a violation of the Interstate Commerce Act, and is an attempt retroactively to regulate charges for transportation beyond the boundaries of this country.

6th—For these reasons the order of the Interstate Commerce Commission here in issue is invalid, and the demurrer to the plaintiff's petition for its enforcement was properly sustained.

Respectfully submitted,

F. D. McKENNEY,
PARKER McCOLLESTER,
*Attorneys for Defendants-in-Error.*

# Supreme Court of the United States

OCTOBER TERM, 1927

No. 235

NEWS SYNDICATE COMPANY, INC.,
*Plaintiff in Error,*
*against*
THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
*Defendants in Error.*

## MOTION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION OR FOR REHEARING.

Now come the defendants in error in the above case and move for leave to file therein the attached petition for reconsideration or for rehearing, notwithstanding the expiration of twenty-five days from the entry of judgment therein, and in support of their motion respectfully show:

I. The opinion of this Court was filed November 21, 1927.

II. For the reasons which more fully appear in the petition, so much of the opinion as declares or implies that the failure of railroads to publish rates from the international boundary contravenes the provisions of the Interstate Commerce Act, constitutes a pronouncement of a

novel principle upon a question of great concern to the railroads generally and to shippers engaged in transportation between the United States and adjacent foreign countries. Because of the far-reaching effect of the principle, due consideration of the decision has made necessary numerous conferences with counsel and traffic officials of the railroads directly involved in the case and of other railroads affected thereby, an examination of the decisions and records of the Interstate Commerce Commission and conferences with its staff, and conferences with representative shippers engaged in such transportation. Although the defendants-in-error have proceeded with all diligence in these matters, they could not be adequately attended to within the twenty-five days allowed by Rule 30 of the rules of this Court.

Wherefore, defendants-in-error pray that the Court may allow this petition to be filed.

Respectfully submitted,

PARKER MCCOLLESTER,
FREDERIC D. MCKENNEY,
*Attorneys for defendants-in-error, petitioners.*

# Supreme Court of the United States

OCTOBER TERM, 1927

No. 235

NEWS SYNDICATE COMPANY, INC.,
*Plaintiff in Error,*

*against*

THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
*Defendants in Error.*

## PETITION FOR RECONSIDERATION OR FOR REHEARING.

Now come the several railroad companies defendants below, and move this honorable Court to reconsider and if so persuaded, to reform so much of its opinion delivered in the above case on the 21st day of November, 1927, as declares, indicates or implies that in the circumstances and facts disclosed by the certificate of the Circuit Court of Appeals for the Seventh Circuit it was and is the duty of said interstate carriers to establish, by publishing in the manner prescribed by the Act to Regulate Commerce as enacted and/or as it now exists, specific rates from the international boundary (between the United States and Canada) and a point (New York City) or points within

the United States; that the failure to publish such rates from the international boundary contravened the provisions of the Interstate Commerce Act, and further, that it rendered the United States carriers liable for damages sustained because of such failure, which damages might be measured by the difference between the joint through rates actually collected from a point in Canada to a point in the United States and joint through rates determined by the Commission to be reasonable. In the alternative, defendants-in-error move this honorable Court to accord them a rehearing or reargument in order that the questions presented may be more fully discussed than is here possible.

The principles announced are novel, are contrary to the policy of and practice prevailing before the Interstate Commerce Commission, and if maintained, at least in their present form, involve the question of the necessity of amending or filing supplements to many and possibly all tariff schedules on file with the Commission wherein rates have been established for transportation movements which cross the international boundary, and of entirely changing the methods of publishing and determining both freight and passenger charges on international transportation which have been in effect for many years.

Neither before the Commission, nor in the Trial Court, nor in the Circuit Court of Appeals, nor by the questions certified, is suggestion made that the railroad companies now before the Court were derelict in their statutory duty because of failure to establish a rate or rates from the international boundary as such. Such a failure was not alleged as the basis for the claim for damages presented to

the Commission, such a failure was not found by the Commission to exist, and it does not appear from the Commission's reports included in the certificate that the Commission's reparation order, whose validity is here in issue, was an order for the payment of damages caused by such a failure. In fact, the contrary appears, for the Commission cited as the ground for its reparation order its decision in *International Nickel Co.* v. *Director General*, 66 I. C. C. 627 (Cer. p. 19), wherein it said:

> "The charging of an unreasonable rate is a tort (*Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U. S. 531, 534), and the parties to such rate are jointly and severally liable for any resulting damage."

Moreover, it does not appear from the pleadings or the Certificate itself that as to this transportation, any one of the defendant companies owns or operates rails from the exact international boundary line, that it actually transported any of the shipments involved from the boundary itself, or that it has at any time been required by the Commission or any other authority to join in a through rate or establish a rate from the exact boundary.

So far as known to us or has been disclosed by such investigation as has been possible of the tariff files of the Interstate Commerce Commission, no tariff schedule filed with the Commission by any carrier in the United States specifies a rate or rates from or to the international boundary line by name.

To publish tariff rates to and from any such spot as where a railroad crosses the international boundary would, under the usual practice before the Commission and the

decided cases, imply a willingness as well as an ability on the part of a carrier to receive, care for, and deliver freights tendered at or consigned to such a point. So far as known to us, no carrier subject to the Interstate Commerce Act has a freight station or maintains an agent or other facilities exactly upon an international boundary line, and in many instances, such as that here, no such facilities could reasonably be established.

At the Niagara frontier the point where the railroads from Canada cross the international boundary is at or approximately in the middle of a bridge, where obviously the carriers have not and cannot reasonably have facilities to receive and deliver freight.

Section 6 (1) of the Act requires carriers to file and publish schedules

> "showing all the rates * * * and charges for transportation *between different points on its own route* and between points on its own route and points on the route of any other carrier by railroad * * * when a through route and joint rate have been established." (Italics Supp.)

It has heretofore been thought that "points" within this requirement, comprehended freight stations and not imaginary points along a railroad's line.

In the present case the railroad companies defendants below received the shipments at their points of interchange with the Canadian carrier, which were points as near the international boundary as freight receiving facilities were practical. Moreover, they actually published rates on newsprint paper from their Niagara frontier stations which

would include their interchange points, so that there was no failure to publish rates from the boundary unless the provisions of the Act are to be interpreted as requiring the publication of rates from the spot where a carrier's rails cross the imaginary line of the frontier.

Section 6, paragraph (6) of the Interstate Commerce Act, provides:

> "The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be convenient."

and paragraph (3) of the same section provides:

> "Provided that the Commisssion may in its discretion * * * modify the requirements of this section in respect to publishing, posting and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions; provided further, that the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges and classifications."

The Commission, by its tariff circular 18-A and supplements thereto, has prescribed the manner and form in which tariffs naming rates shall be filed and published. It has therein made no requirement that rates for transportation between the United States and Canada shall be published to or from the boundary.

Indeed, the policy of the Interstate Commerce Commission as indicated by occasional expressions which appear

here and there in its reported opinions seems to have been and to be to encourage the establishment of joint rates for all traffic crossing the International Boundary. For example, in *International Paper Co.* v. *Delaware & Hudson Co., et al.*, 33 I. C. C. 270, 273 (bottom), it was said:

> "We cannot require the maintenance of joint rates from Canada into the United States nor control the charges that carriers in Canada may make for transportation services in that country. We might require the defendants to cease and desist from continuing the joint rates complained of and to establish their own rates for the service within the United States. The traffic would then move on combinations of rates. We see no occasion for doing this, nor do we see how that action could benefit these complainants. * * *
>
> "Joint rates from and to Canada are a convenience to the public and to carriers. They tend to promote easy and prompt movement of traffic and should be continued unless they are unreasonable or otherwise unlawful. We do not conceive that merely because the rates are published as joint through rates we have power to determine what the railroads of Canada shall charge for transportation of freight to the border."

Neither in the cited case nor in *Philip Carey Mfg. Co.* v. *Grand Trunk Western, &c.*, 36 I. C. C. 203, where the joint rates complained of were held to be unjustly discriminatory against complainants, nor in *International Nickel Company* v. *Director General, as Agent, &c.*, 66 I. C. C. 627, where the joint rates complained of were held to be unreasonable and reparation awarded, nor in many other cases has the Commission required the participating Amer-

ican carriers to establish rates to or from the International Boundary, in lieu of joint rates.

And in the case at bar the Commission expressly indicated its expectation and desire that a joint through rate from Thorold, Ontario, to New York City, should be established (Cer. 23, 24), and disclaimed any intention of requiring the publication of rates from the boundary (Cer. 19). This practice of the Commission is of especial significance, since the Commission is required by Section 12 of the Interstate Commerce Act to enforce its provisions, and since this Court has recognized the importance to be attached to the Commission's interpretation of the Act. *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401. And Congress, though it must be presumed to have known the practice and decisions of the Commission during all these years, has not amended the tariff publishing provisions of the Act to require rates to be published to and from the international boundaries as such.

The foregoing arguments have not heretofore been advanced in this case, since it has not been considered that the case presented the question whether the failure to publish rates from the international boundary should be held to constitute a violation of the Interstate Commerce Act, no such finding having been made by the Commission and its reparation order here in suit not being an order for damages caused by such a violation.

If this question be in issue, there is more that could be said upon it. For instance, there is presented the question whether, assuming that the failure to publish rates from the boundary is a violation of the Act, the damages caused thereby may properly be measured by the amount

by which the Commission determined the through rate to be unreasonable. It would seem that the damages caused by such a violation would be the difference between the charges actually paid and the charges which the shipper would have paid had rates been published to and from the boundary, and it seems to us that it does not necessarily follow that if the Canadian carriers had published a rate up to the boundary and the American carriers had published a reasonable rate from the boundary to New York, the total charges would have been different from those which the shippers actually paid, or would have been less in the exact amount by which the Commission awarded damages on a different theory.

There is the further question whether, since in this case it was the Canadian carrier that hauled the freight from the exact boundary a few hundred yards to the interchange point, the American carrier was guilty of any violation in not publishing rates from the boundary, when it does not appear and has not been found that the Canadian carrier was willing to publish such a rate and the American carrier refused so to do.

For these reasons it is believed that if the question of the existence of such a violation is here in issue, it may be desirable to have further argument thereon in order that the implications involved may be fully discussed.

However, it may be that notwithstanding the above, the answers heretofore given by the Court to the questions certified would remain unchanged. Our chief concern is not with the answers themselves, but with the desire to obviate, if possible, the uprooting of a rate-making practice which, with the active concurrence of the Commission,

has prevailed without question on the part of shippers and carriers through many years, and the initiation at this late date, without a full discussion and examination of its desirability, of the practice of establishing rates to and from imaginary points on the international boundaries, which practice may lead into many and possibly as yet unsuspected difficulties.

Respectfully submitted,

PARKER MCCOLLESTER,
FREDERIC D. MCKENNEY,
*Attorneys for defendants-in-error, petitioners.*

January 3, 1928.

I, PARKER MCCOLLESTER, of counsel for defendants-in-error, petitioners, hereby certify that this motion and petition are presented in good faith and not for delay.

PARKER MCCOLLESTER.

# SUPREME COURT OF THE UNITED STATES.

No. 235.—October Term, 1927.

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|---|---|
| News Syndicate Company, *vs.* The New York Central Railroad Company, The Pennsylvania Railroad Company, et al. | On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit. |

[November 21, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

Plaintiff in error sued for amounts of reparation awarded by the Interstate Commerce Commission. Defendants in error demurred to the complaint asserting that it failed to state a cause of action and that the Commission's order was void for want of jurisdiction because it dealt solely with charges for transportation from a point in Canada to a point in the United States. The district court sustained the demurrer and gave judgment of dismissal. The case was taken to the Circuit Court of Appeals; and, after hearing the parties, that court certified certain questions concerning which it desires instructions for the proper decision of the cause. § 239, Judicial Code. U. S. C. Tit. 28, § 346.

The certificate shows that, June 28, 1923, plaintiff in error complained to the Interstate Commerce Commission against defendants in error and others that during the preceding two years it shipped numerous carloads of newsprint paper from Thorold, Ontario, to New York City and bore charges exacted by defendants in error based on through rates of 37 cents per hundredweight prior to July 1, 1922, and 33.5 cents thereafter, and that these rates and the portions thereof applicable to the transportation within the United States were excessive, unduly discriminatory and unjustly prejudicial in violation of the Interstate Commerce Act; that the Commission found the rate in force between August 26, 1920, and July 1, 1922 unreasonable to the extent it exceeded 32 cents

and the rate thereafter applied unreasonable to the extent that it exceeded 29.5 cents, and that plaintiff in error suffered damages in respect of its shipments after July 2, 1921, in the amounts by which the charges were so found to be unreasonable and was entitled to reparation from the carriers that "engaged in the transportation of those shipments within the United States."

The reports of the Commission set out in the certificate (95 I. C. C. 66; 102 I. C. C. 365) show that Thorold is a place in Ontario on the Canadian National Railways 30 miles from Black Rock, New York, where connection is made with the New York Central, the Delaware, Lackawanna and Western and other lines, and 12 miles from Suspension Bridge, New York, where connection is made with the New York Central, Lehigh Valley and other lines, and that Black Rock is 414 miles and Suspension Bridge is 447 miles from New York City. The rates complained of applied over several railroads from each of these junctions. No rates were made or published for the transportation from the international boundary to New York City. The Commission did not determine what would be just and reasonable rates for this transportation.

The questions certified follow.

1. Where a railroad of the United States and a railroad of the Dominion of Canada unite in the publication of a joint through rate from a point within the Dominion of Canada to a point within the United States, the rate covering transportation both in Canada and in the United States, has the Interstate Commerce Commission of the United States jurisdiction, on complaint of a shipper or consignee made against the United States railroad alone, to determine the reasonableness of such joint through rate?

2. Where a shipper or consignee of freight shipped to it at a destination in the United States from such point in the Dominion of Canada has paid at destination to the United States railroad the full published joint through freight rate thereon, has the Interstate Commerce Commission, upon a finding by it that such joint through rate was unreasonable and unjust, but in the absence of a finding that the charges for the transportation in so far as it took place within the United States were unjust and unreasonable, jurisdiction to make an order for the payment of damages to such shipper or consignee in the amount that the entire transportation charges on the basis of the joint through freight rate exceeded the charges which would have been assessed on the basis of the joint through freight rate found by the Commission to have been reasonable?

3. When the Interstate Commerce Commission had made such an order against the United States carrier alone for the payment of damages arising from its finding of the unreasonableness of such published joint through rate, can a suit thereon, under section 16 of the Interstate Commerce Act, be maintained solely against the United States carrier?

4. Did the district court err in sustaining the demurrer to the said petition?

As to question 1.—The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. § 1 (1) and (2).* It was the duty of defendants in error to establish just and reasonable rates for that service. § 1 (5), § 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 231. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an "award of damages under the provisions of this Act for a violation thereof." § 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

As to question 2.—The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing

*United States Code, Title 49, chapter 1, contains the Interstate Commerce Act, preserving the section numbers.

the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, § 13 (1), and had jurisdiction to make the order. § 16 (1). The question should be answered in the affirmative.

As to question 3.—The statement of the case and what has been said as to questions 1 and 2 make it plain that this question should be answered in the affirmative.

As to question 4.—Section 239 authorizes the Circuit Court of Appeals to certify to this court "any questions or propositions of law concerning which instructions are desired for the proper decision of the cause." It is well-settled that this statute does not authorize the lower court to make, or require this court to accept, a transfer of the case. The inquiry calls for decision of the whole case. It is not specific or confined to any distinct question or proposition of law, and therefore need not be answered. *The Folmina*, 212 U. S. 354, 363; *United States* v. *Bailey*, 9 Pet. 267, 273-274; *United States* v. *Mayer*, 235 U. S. 55, 66, and cases cited.

*Question 1 is answered "Yes, for the ascertainment of damages."*
*Question 2 is answered "Yes."*
*Question 3 is answered "Yes."*
*Question 4 is not answered.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*